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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 999

PEGGY J. CONNOR, *et al.*,

Appellants,

—v.—

PAUL B. JOHNSON, JR., Governor of Mississippi, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	3
The Facts	4
The Questions Are Substantial	11
A. The Right to Vote May Not Be Denied, Directly or Indirectly, Because of Race	13
B. Congressional Districts May Not Be Established in a Racially Discriminatory Manner	14
C. The Mississippi Legislature Has Adopted a Plan Involving Racial Gerrymandering, Which Should Be Set Aside	18
D. The Issues Here Involved Have Not Heretofore Been Squarely Presented to This Court, and Lower Court Differences on Subsidiary Questions Are Now Appropriate for Resolution	22
Conclusion	23

PAGE

APPENDIX A

Judgment of the District Court 25
Opinion of the District Court 27

APPENDIX B

Map Showing District Lines Adopted by Mississippi Legislature 39

APPENDIX C

Map Showing Counties With Total Negro Population Majorities 40

APPENDIX D

Map Showing Revised Delta Plan 41

APPENDIX E

Map Showing Northern Vertical Plan 42

APPENDIX F

Table of Legislative History 43

APPENDIX G

Map Taken from *The Mississippi Story*, by McLemore and McLemore 44

APPENDIX H

Map Taken from *Mississippi: A History*, by John K. Bettersworth 45

Table of Authorities

PAGE

Cases:

Burns v. Richardson, 384 U. S. 73 (1966) 15, 16, 20, 23
Bush v. Martin, 251 F. Supp. 484 (1966) 23

Carrington v. Rash, 380 U. S. 89 (1965) 13

Eubanks v. Louisiana, 356 U. S. 584 (1958) 19

Fortson v. Dorsey, 379 U. S. 433 (1965) 15, 16, 19, 22

Gomillion v. Lightfoot, 364 U. S. 339 (1960) 13, 14, 15, 20
Grills v. Branigan, 255 F. Supp. 155 (1966), vacated sub nom. Duddleston v. Grills, 35 U. S. L. Week 3233 (January 10, 1967) 23
Guinn v. U. S., 238 U. S. 347 (1915) 13, 14

Hainsworth v. Martin, 386 S. W. 2d 202 (Civil Appeals, Texas, 1965), vacated as moot 382 U. S. 109 (1965), rehearing den. 382 U. S. 1002 (1966) 23
Harper v. Board of Elections, 383 U. S. 663 (1966) 13

Johnson v. Virginia, 373 U. S. 61 (1963) 19
Jones v. Falcey, 48 N. J. 25, 222 A. 2d 101 (1966), 222 A. 2d 134 (1966) 23

Katzenbach v. Morgan, 384 U. S. 641 (1966) 13
Kilgarlin v. Martin, 252 F. Supp. 404 (1966) 23

Lane v. Wilson, 307 U. S. 268 (1939) 13
Louisiana v. U. S. 380 U. S. 145 (1965) 13

Meeks v. Avery, 251 F. Supp. 245 (1966) 23

PAGE

N. A. C. C. P. v. Alabama, 357 U. S. 449 (1958) 19
Nixon v. Condon, 286 U. S. 73 (1932) 13
Nixon v. Herndon, 273 U. S. 536 (1927) 13

Reynolds v. Sims, 377 U. S. 533 (1964) 14
Rice v. Elmore, 165 F. 2d 387, cert. den. 333 U. S. 875 (1947) 19

Sims v. Baggett, 247 F. Supp. 96 (1965) 15, 17, 22, 23
Smith v. Allwright, 321 U. S. 649 (1944) 13
South Carolina v. Katzenbach, 383 U. S. 301 (1966) 13
Swann v. Adams, 35 U. S. L. Week 4101 (January 10, 1967) 18, 23

Terry v. Adams, 345 U. S. 461 (1953) 13, 20

U. S. v. Classic, 313 U. S. 299 (1941) 13
U. S. v. Mississippi, 380 U. S. 128 (1965) 13

Wesberry v. Sanders, 376 U. S. 1 (1964) 14
Wright v. Rockefeller, 376 U. S. 52 (1964) 15, 16, 23

United States Constitution:

Fourteenth Amendment 2, 12, 13, 14

Fifteenth Amendment 2, 12, 13, 14

Statute:

28 U. S. C. §1253 2

28 U. S. C. §2101(b) 2

House Bill No. 911, Mississippi Laws 1966 ....2, 3, 4, 5, 7, 23

PAGE

Miscellaneous:

Smith, *Congressman From Mississippi* 10

Newspapers:

Jackson Daily News (January 14, 1966) 10

Jackson Daily News (March 7, 1966) 10

Jackson Clarion Ledger (April 1, 1966) 11

Jackson Daily News (April 7, 1966) 11

IN THE

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No. .....

PEGGY J. CONNOR, ANNE E. TAYLOR, AUGUSTA WHEADON, RALTHUS HAYES, CATHERINE CROWELL, HENRY J. KIRKSEY, ELIJAH CONWELL, JR., ALMA CARNEGIE for themselves and others similarly situated, and THE MISSISSIPPI FREEDOM DEMOCRATIC PARTY,

Appellants,

—v.—

PAUL B. JOHNSON, Governor of Mississippi, JOE PATTERSON, Attorney-General of Mississippi, HEBER LADNER, the Secretary of State of Mississippi, WALTER SILLERS, the Speaker of the Mississippi House of Representatives, GEORGE YARBROUGH, the President Pro Tempore of the Mississippi Senate,

Appellees.

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Southern District of Mississippi, Jackson Division, sitting as a statutory three-judge court, which held that, as to the redistricting of the state of Mississippi for the election of members of the United States House of Representatives, the appellants' complaint should be dismissed, and submit this statement

to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The judgment and opinion of the District Court are set forth below in Appendix A, *infra*, p. 25 ff.

Jurisdiction

The jurisdiction of this Court to review by appeal the judgment of the three-judge District Court is conferred by 28 U. S. C. §§1253 and 2101(b).

Question Presented

Whether the congressional district lines drawn by the 1966 session of the Mississippi legislature, which, deliberately or otherwise, have a racially discriminatory effect, violate the Fourteenth and Fifteenth Amendments to the U. S. Constitution.

Statute Involved

House Bill No. 911, Mississippi Laws 1966, approved by the Governor of Mississippi on April 8, 1966, establishes the district lines for elections to membership in the United States House of Representatives. The lines established by such Bill are set forth in Appendix B, *infra*, p. 39.

Statement of the Case

The appellants' original complaint, filed on October 19, 1965, challenged the then existing congressional districting scheme in Mississippi both on racial grounds and on grounds of gross disparity of population. The complaint also attacked on similar grounds the apportionment of both houses of the Mississippi state legislature. Although the complaint prayed for a preliminary injunction, the court withheld any hearing or action on the complaint until after the completion of the regular 1966 session of the Mississippi legislature.

In its regular 1966 session, the Mississippi legislature failed to provide for reapportionment of its state legislature, and the court below ordered it to produce such a state legislative reapportionment on or before December 1, 1966. The state legislature in a special session has now passed a state reapportionment act. The validity of that reapportionment was argued before the court below on January 9, 1967, on grounds substantially similar to those presented here as to congressional redistricting.

The regular 1966 session of the Mississippi legislature did, however, enact a new congressional districting act, House Bill 911. The plaintiffs amended their complaint on July 12, 1966, specifically attacking the validity of this plan on grounds of racial discrimination and inequality of meaningful representation. A hearing was held on that amended complaint, and judgment was entered on August 30, 1966, sustaining the validity of that plan and rendering judgment for the defendants.

The Facts

House Bill 911 creates five congressional districts in each of which the white vote will, presently and in the foreseeable future, outweigh the Negro vote, and thus preserves a white majority in all five of the state's congressional districts, despite a 43% Negro population in the state as a whole, which is largely concentrated in one compact and geographically discrete section of the state. This is the inescapable effect of the Bill, and was indeed its purpose. Three separate sets of facts substantiate these conclusions: first, a statistical analysis of the district lines themselves; second, a review of all possible purposes such lines might serve, which excludes all inferences other than racial discrimination; and third, the analysis of the legislative history of the bill itself, and the history of the debates on its passage.

The basic legislative history of the bills, as to which a large mass of evidence was introduced at the trial, is summarized in Appendix F, *infra*, p. 43.

The state Senate's considerations began with a plan having one of the five congressional districts with a non-white majority, but in that district the majority was substantial enough to create at least a possibility that of the five Congressmen to be elected from Mississippi one might be a Negro. The state House approach, and the one finally adopted by the legislature, was more thoroughgoing; it attempted to make absolutely certain that there would be no meaningful non-white majority in any of the state's five districts, in order to assure an all-white Mississippi delegation to Congress. Indeed, the first plan prepared by the House, introduced January 13, 1966, provided that in the

district with the largest number of non-whites, whites retained an effective voting majority of 15,852.

As the legislative session progressed, the House and the Senate versions of a redistricting plan came closer together, until at last the Senate adopted a bill that reduced sharply the non-white majority of the *total population* in its one non-white district, and the House accepted this as providing a sufficiently safe margin of white *votes* to guarantee continuing white supremacy. The total population figures, according to the United States Census of 1960 (R. Ex. 1) thus became under the new Bill:

District	Total Population	Total White	Total Nonwhite		Majority
First	449,361	218,564	230,797	non-white	12,233
Second	427,471	243,047	184,424	white	58,623
Third	428,447	233,665	194,782	white	38,883
Fourth	423,300	214,747	208,553	white	6,194
Fifth	449,565	342,526	107,039	white	235,487

The effect of these figures on the ability of Negroes in Mississippi to vote meaningfully in congressional elections, and the facts which actually shaped the legislature's intent and purpose in adopting House Bill 911, is apparent from the *eligible voting* figures which the legislature itself used rather than the Census figures (R. Ex. 12):

District	White Eligible Voting Majority
First	32,581
Second	69,772
Third	52,632
Fourth	54,767
Fifth	143,923

The other practical way of looking at the Census figures to deduce their real meaning in Mississippi is to take the voting-age figures and apply to them the pattern of actual voter registration as of July 30, 1966, testified to as being 30% of eligibles for Negroes and 62% of eligibles for whites (R., Deposition of J. Harold Flannery). The results are substantially identical to the above:

District	White Registered Voter Majority
First	30,844
Second	64,681
Third	58,114
Fourth	54,479
Fifth	104,170

This discriminatory result was not accidental, nor was it produced by any constitutionally permissible factor. A brief look at Mississippi's history and geography will show why.

Looking at textbook maps of Mississippi (Appendices G and H, *infra*, pp. 44 and 45), it is apparent that Mississippi is divided into a number of major areas. One of these is the Delta region, a rich agricultural area adjacent to the Mississippi River that stretches from the Mississippi River eastward to the beginning of the Bluff Hills and lies primarily between the Mississippi and the Yazoo Rivers. It is an area of fertile land on which the plantation system of cotton farming, once prevalent throughout the South, achieved its greatest flowering. It is set apart as a region through the richness of its soil, the singleness of the crop produced, the unique economic system through which that crop is developed, the presence of the Mississippi river as

a common waterway and scenic feature, and historically by a unity of interest that has projected itself as a political force throughout the State for a generation. These facts are among those of which the trial court took judicial notice.

Each congressional redistricting, at least since 1894, has preserved the counties of the Delta within a single congressional district, reflecting their historic, geographic, economic and social unity. The fact that the Delta is the cotton-growing and plantation-dominated section of Mississippi and is also that part of Mississippi in which a majority of its Negro citizens live, is, of course, not a coincidence.

As long as Negroes were directly denied the franchise, this caused no problem in the establishment of voting districts. Once Negroes in Mississippi obtained the legal right to vote, in large part by decisions of this Court, their majority status in the Delta became a threat to those previously in political control of the state. The present gerrymandering of districts followed.

A brief examination of three maps demonstrates by itself the racial distortion imposed on the state of Mississippi by House Bill 911. Appendix C, *infra*, p. 40, shows, as marked, those counties that have an absolute majority of Negro citizens. Appendix D, *infra*, p. 41, presents a proposed redistricting plan, which appellants have labeled "Revised Delta Plan," which differs sharply from the plan adopted by the legislature in that it preserves the integrity of the Delta. Appendix B, *infra*, p. 39, presents a redistricting scheme dividing the counties of the Delta, *i.e.* those with Negro majorities among four different congressional districts; this is the plan which was adopted by the Mississippi legislature. Neither history, geography, topography, economics,

tradition, political subdivision lines, compactness, contiguity, or any other legitimate factor explains the lines used in this plan.

Nor does the legislature's adopted plan conform to standards of population equality when compared to the available alternatives. The difference between the largest and the smallest district under the plan adopted is 28,061; the same figure for the Revised Delta Plan is 13,672, less than half. The greatest deviation from the norm in the adopted plan is 15,332; in the Revised Delta Plan, it is 7,572. The average deviation of all five districts in the adopted plan is 11,547; in the Revised Delta Plan, it is 3,767. Clearly, the desire to achieve mathematical population equality was not decisive for the Mississippi legislature in its choice of plans.

The racial motivation of the Mississippi legislature can be seen from one further alternative plan, set forth in Appendix E, *infra*, p. 42, designated the Northern Vertical Plan. This plan substantially accepts Districts 3, 4 and 5 of the adopted plan, and simply draws the boundaries between Districts 1 and 2 vertically, to conform with the facts of Mississippi life, rather than horizontally, as the legislature did. Such a recognition of Mississippi geography and history also produces a mathematically superior plan. The average deviation in the Northern Vertical Plan is only 7,266, compared with 11,547 in the adopted plan, and the difference between the largest and the smallest districts is reduced from the 28,061 of the adopted plan to 23,740. The refusal to recognize the unity of the Delta, if only by a plan such as this, can be explained by no consideration other than the desire to divide its Negro population among other districts where their votes will be a minority and ineffective.

While the redistricting lines adopted by the Mississippi legislature, in their effect on the Negro vote, speak for themselves, an attempt has nevertheless been made to assemble all the evidence reasonably available to appellants that cast light on the specific intent of the legislature. The evidence shows that the racially discriminatory result of the redistricting lines was in fact the precise objective of the legislature. The apparent concern of the legislature was to draw the lines in such a manner that its discriminatory intent would not be so obvious as to foreclose any chance of success in the lawsuit already pending.

There are unusual problems in seeking to prove legislative intent in Mississippi. The Mississippi legislature has learned from experience that federal courts are concerned about the policy of segregation and discrimination in Mississippi, as one court after another has invalidated its legislative acts. The legislature has seen its own debates used as evidence of such unconstitutional and improper motivation; it no longer keeps any record of its own debates. Such reports as were introduced into evidence in the court below as to debates of the legislature are replete with references to the likelihood of litigation on the subject of the discriminatory nature of the present redistricting, and one legislator after another can be found advising his colleagues to talk less about the Negro vote because of the bearing upon possible litigation (R., Ex. 4-12). Proof of legislative intent must thus necessarily be based on incomplete accounts and indirect references.

Taking into account these well-known facts, what does the available evidence indicate? First, it indicates a clear awareness by the Mississippi legislature of the possibilities inherent in the conscious handling of congressional district lines to achieve desired purposes. After the 1960

census, when redistricting was required because of the elimination of a congressional seat as the result of a reduction in population, two congressional districts were combined to eliminate an annoyingly liberal congressman, as described in detail in Frank Smith's *Congressman from Mississippi*. Second, reported debates on the subject indicate a major concern for the impact of any new proposal on the actual and potential Negro vote. Brief quotations from legislators set forth in the newspaper stories introduced into evidence show this clearly (R., Ex. 4-12):

Jackson Daily News, January 14, 1966:

> "Did the Negro situation enter in this redistricting plan?" asked Rep. Odie Trenor . . . When he got no answer to his question he said, "we all know the Negro situation was the main factor."
>
> Rep. Thompson McClellan of Clay said, "When this bill is attacked in the courts they're going to look into what areas were moved, where they were moved and for what purposes they have been moved. They were moved so there shall not be a majority of certain groups in a district. The courts will consider a similar case and they'll throw this out. We will have congressmen elected at large or by districts fixed by the Supreme Court.
>
> This patently was drawn in a manner to devalue the vote of a certain group of people."
>
> Backers of the plan did not deny that the Delta area was split up to divide the heavy Negro vote.

Jackson Daily News, March 7, 1966:

> Rep. Clyde Burnes said that the House bill "had a little too much discrimination to be ignored (by the courts)."

Jackson Clarion-Ledger, April 1, 1966:

> A plan adopted by the Senate would have given the Second (District) a heavy Negro majority, but the House rejected this in favor of five districts with white majorities. Most senators agree that unless one heavily-Negro majority district is established, the government will knock the redistricting plan out through the federal courts.

Jackson Daily News, April 7, 1966:

> Rep. Thompson McClellan . . . argued . . . "Any bill that shows discrimination against a certain race they'll knock down. You are trying to take two white counties in northeast Mississippi out of the 2nd District and put a heavy Negro populated county in. They will say this bill is fraught with discrimination."

Thus, the facts are that the Mississippi legislature, itself found to be sitting in violation of Constitutional provisions, drew congressional district boundaries along clearly racial lines. The right to vote effectively in congressional elections was thereby denied to its Negro citizens. This was done with the clear and deliberate intent to discriminate.

The Questions Are Substantial

In this appeal two great constitutional principles converge in circumstances that compellingly demonstrate the denial or dilution of the free exercise of the right of franchise because of discrimination on grounds of race or color.

First. This Court has long recognized, in a wide variety of situations, that racial discrimination at the hands of

the state, whether intentional or not, is forbidden. Most often the racially discriminatory action is said to violate the equal protection of the laws of the Fourteenth Amendment; sometimes, where the right to vote is at issue, the more specific prohibition of the Fifteenth Amendment has been invoked. The question here is whether the Fourteenth and Fifteenth Amendments allow a state to grant with one hand the formal right to vote to the members of a particular racial group, while with the other hand effectively, although indirectly, depriving them of that right by the drawing of district lines in a racially discriminatory manner.

Second. More recently this Court has held that the proper drawing of congressional district lines by state legislatures is subject to judicial review to see whether such lines provide a substantially equal vote to every person within the state. The question here is whether such district lines are properly drawn where, deliberately or otherwise, their necessary effect is to cancel out the voting strength of a particular racial group.

Specifically, Negroes in Mississippi now have *pro forma* the right to vote, and *pro forma* numerically the vote of each Negro is worth substantially the same as the vote of each white. In fact, this hard-won formal right to vote has been rendered largely nugatory in Mississippi by the action of its legislature here challenged.

The question newly presented here is whether, under such facts, Negroes have not indeed been as clearly denied the right to vote as though they had been refused the right to register. Alternatively put, the question is whether district lines established to discriminate racially are not just as unconstitutional as district lines established to discriminate geographically on a population basis.

A. *The Right to Vote May Not Be Denied, Directly or Indirectly, Because of Race.*

The equal protection of the laws clause of the Fourteenth Amendment forbids denial of the right to vote on grounds of race or color, and the Fifteenth Amendment specifically forbids discrimination in the exercise of the franchise because of race or color. Moreover, the Constitution "nullifies sophisticated as well as simple minded modes of discrimination." *Lane* v. *Wilson,* 307 U. S. 268, 275 (1939). Most notable are the voting-rights cases, some based on the Fourteenth Amendment, *Nixon* v. *Herndon,* 273 U. S. 536 (1927) and *Nixon* v. *Condon,* 286 U. S. 73 (1932), and some on the Fifteenth Amendment, *Guinn* v. *United States,* 238 U. S. 347 (1915), *Lane* v. *Wilson,* 307 U. S. 268 (1939), *United States* v. *Classic,* 313 U. S. 299 (1941), *Smith* v. *Allwright,* 321 U. S. 649 (1944), and *Terry* v. *Adams,* 345 U. S. 461 (1953).

Other right-to-vote cases, raising related issues of discrimination, have also been grounded on the Fourteenth and Fifteenth Amendments. See, *e.g., Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960) (legislative redrawing of municipal lines to exclude Negro voters violates Fifteenth Amendment); *Carrington* v. *Rash,* 380 U. S. 89 (1965) (limitation of right of resident members of armed forces to vote in state elections violates Fourteenth Amendment). See also *United States* v. *Mississippi,* 380 U. S. 128 (1965); *Louisiana* v. *United States,* 380 U. S. 145 (1965); *Harper* v. *Board of Elections,* 383 U. S. 663 (1966); *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966); and *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966).

The present appeal presents an issue similar to that in *Gomillion, supra,* because here, as there, the state legisla-

ture has drawn electoral lines with the intent and effect of minimizing or canceling out the voting strength of its substantial Negro population. Here, as in *Gomillion*, the right to vote *somewhere* is not denied; but the right to cast an effective ballot is effectively eliminated.

> "The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever, so long as it was cloaked in the garb of the realignment of political subdivisions. 'It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence . . .'" *Gomillion* v. *Lightfoot*, 364 U. S. 339 at 345.

Accordingly, appellants urge that the action of the Mississippi legislature, operating to deprive Negroes of the right to cast a meaningful ballot, denies appellants equal protection of the laws in violation of the Fourteenth Amendment and violates the Fifteenth Amendment as a denial or abridgment of the right to vote on grounds of race or color.

B. *Congressional Districts May Not Be Established in Racially Discriminatory Manner.*

Approaching the same problem from a different point of view, courts have, since *Wesberry* v. *Sanders*, 376 U. S. 1 (1964) and *Reynolds* v. *Sims*, 377 U. S. 533 (1964), scrutinized very carefully the consequences of particular district lines and the considerations which may have motivated legislatures in drawing them. Full equality of meaningful representation has been the basic standard, and, while considerations such as preservation of local political bound-

aries have been permitted to justify minor deviations from this standard, reasons of race are clearly excluded. Where reasons of race were found to have actually motivated the drawing of district lines, such lines have been set aside. *Sims* v. *Baggett,* 247 F. Supp. 96 (1965). This Court has on several occasions expressed its concern with the influence of racial factors in drawing of lines, but in each of the cases thus far presented to this Court, the issue was not appropriately drawn for decision on this point. See *Fortson* v. *Dorsey,* 379 U. S. 433 (1965) and *Burns* v. *Richardson,* 384 U. S. 73 (1966).

The first case, other than *Gomillion* v. *Lightfoot, supra,* that raised the issue at least tangentially was *Wright* v. *Rockefeller,* 376 U. S. 52 (1964), in which the majority of this Court accepted "the findings of the majority of the District Court that appellants failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines." *Id.* at 56. There was, however, nothing in the majority opinion to suggest approval of racial gerrymandering. Indeed, both dissenting opinions by Justices Douglas and Goldberg specifically stated that racially motivated districting is unconstitutional, a proposition with which the majority expressed no disagreement and with which disagreement is scarcely possible. The difference, then, was only whether "the factual pattern of segregation . . . was sufficient to establish a prima facie case of unconstitutional racial districting." *Id.* at 74 (Mr. Justice Goldberg dissenting). The pattern of voting segregation in this case is much more vivid on the present record. Moreover, there are not in this case, as there were said to be in *Wright,* any "conflicting inferences" of legislative purpose which could be drawn from the evidence.

In more recent majority opinions this Court has noted that racially motivated action in legislative reapportionment or in congressional districting may be held to violate the Constitution upon an appropriate factual showing, but found the showing lacking. See *Fortson* v. *Dorsey, supra,* at 439 (1965), and *Burns* v. *Richardson, supra.*

In the latter case, the Court stated:

> "Speculations do not supply evidence that the multi-member districting was designed to have or had the invidious effect necessary to a judgment of the unconstitutionality of the districting." *Id.* at 88-89.

Moreover, "the legislature did assign reasons for its choice." *Id.* at 89.

In the present instance, on the other hand, the Mississippi legislature, emerging from its unrecorded meetings, gave no reasons to support the districting adopted, and the state officials in the proceedings below suggested no reasons. No evidence was offered to explain the radically new lines utilized in this redistricting, and all other inferences were clearly negated on the record, except the inference of racial discrimination. Such inference is buttressed by examination of the lines drawn and confirmed by the affirmative evidence of intent offered.

In a strikingly similar context, a three-judge Federal Court in the same Circuit held:

> "The House plan adopted by the all-white Alabama Legislature was not conceived in a vacuum. If this court ignores the long history of racial discrimination in Alabama, it will prove that justice is both blind

> and deaf. . . . With the pattern and practice of discrimination in Alabama as a backdrop, the cavalier treatment accorded predominantly Negro counties in the House plan takes on added meaning. The court is permitted to find the intent of the Legislature from the consistency of inherent probabilities inferred from the record as a whole. . . . The background and facts presented are substantially different from those appearing in the record, in *Wright* v. *Rockefeller*, 211 F. Supp. 460, aff'd 376 U. S. 52. . . . There nonwhites had long been given the vote and had historically been represented by nonwhites in the councils of state. Historic maps were introduced to show that the districts had always had erratic lines aggregating neighborhoods. . . . In the present case, we have a situation where nonwhites have long been denied the right to vote and historically have not been represented by nonwhites in the councils of state. . . . It would be unfortunate if Alabama's Negroes were to find, just as they were about to achieve the right to vote, that that right had been abridged by racial gerrymandering." *Sims* v. *Baggett*. *Id.* at 109.

This Court and other courts have had occasion to discuss the considerations which a legislature may legitimately take into account in reviewing the propriety of districts which deviate from strict population norms. The 1966 congressional districting act of the Mississippi legislature appears on its face substantially to meet the test of numerical equality; the population deviations from the mean of approximately 435,000 do not exceed 3 per cent, which would normally not seem excessive. However, other

plans (Appendices D and E, *infra*, pp. 41 and 42) were submitted which "do demonstrate that a closer approximation to equally populated districts was a feasible undertaking," *Swann* v. *Adams*, 35 U. S. L. Week 4101, 4103 (January 10, 1967); in these alternate plans the division of any county was also avoided, and at the same time they preserved the historical pattern of congressional districting in Mississippi much better, and conform more nearly to socio-economic-topographical patterns in the state. Most important of all, these alternate plans are altogether free of the racial gerrymander.

All the criteria of rational congressional districting could easily have been satisfied by the adoption of any one of several alternative plans. Indeed, it would not have been possible to devise a plan that satisfied all the legitimate criteria to any substantial extent without at the same time creating a congressional district with a substantial majority of Negroes of voting age, which was precisely what the Mississippi legislature was concerned to avoid. They therefore adopted a plan with less equal numerical districts; no explanation was offered for this by the state, and indeed none was available to it other than the frank acknowledgment of the importance of race.

C. *The Mississippi Legislature Has Adopted a Plan Involving Racial Gerrymandering, Which Should Be Set Aside.*

The gerrymander is essentially a device for constructing electoral units to the disadvantage of a disfavored group or to the advantage of a favored group, or for the accomplishment of both objectives at the same time. Now that malapportionment has been condemned and the integrity of the right to vote protected from all types of direct

attack, the gerrymander is the device currently most destructive of fairness in the electoral process. Malapportionment, racial restrictions on the franchise, and the gerrymander are all of the same family.

Appellants submit that the evidence clearly demonstrates that the intent, purpose and effect of the Mississippi legislature's plan is to gerrymander district boundaries so as to discriminate against Negroes.

Invalidity of the act can be established upon demonstration either that the Mississippi plan was racially motivated *or* that it "would *operate* to minimize or cancel out the voting strength of racial . . . elements of the voting population." (Emphasis supplied.) *Fortson* v. *Dorsey,* 379 U. S. 433, 439 (1965).

It has long been clear in other contexts that state action which effects racial disadvantage is suspect even though the discriminatory consequences are not shown to have been intended. *Johnson* v. *Virginia,* 373 U. S. 61, 62 (1963); *NAACP* v. *Alabama,* 357 U. S. 449, 461 (1958); *Eubanks* v. *Louisiana,* 356 U. S. 584, 587-88 (1958).

The same emphasis on effect independent of purpose and intent has been expressed in directly related voting cases. For instance, in *Rice* v. *Elmore,* 165 F. 2d 387, *cert. denied* 333 U. S. 875 (1947) at 392, the Fourth Circuit said:

> "Their primary purpose [the 14th and 15th Amendments'] must not be lost sight of, however, and no election machinery can be upheld if its purpose *or effect* is to deny to the Negro on account of his race or color, any effective voice in the government of his country or the state or community wherein he lives." (Emphasis supplied.)

This language was cited with approval in *Terry* v. *Adams*, 345 U. S. 461 at 466 (1952):

> "The Court of Appeals in invalidating the South Carolina practice answered these formalistic arguments by holding that no election machinery could be sustained if its purpose *or underlying effect* was to deny Negroes on account of their race an effective voice in the governmental affairs of their country, state or community." (Emphasis supplied.)

This Court again said, in *Gomillion* v. *Lightfoot*, *supra*, at 341-342:

> "It is difficult to appreciate what stands in the way of adjudging a statute having this *inevitable effect* invalid in light of the principles by which this Court must judge . . ." (Emphasis supplied.)

And most recently in *Burns* v. *Richardson*, *supra*, at 88, this Court stated:

> "Where the requirements of *Reynolds* v. *Sims* are met, apportionment schemes, including multi-membered districts, will constitute an invidious discrimination only if it can be shown that *'designedly or otherwise* a multi-membered constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population'." (Emphasis supplied.)

In any event, it is submitted that adequate proof, both of purpose *and* effect, has been supplied. That something unusual occurred in the drawing of Mississippi's district

lines in the present plan can be seen by a look at the First Congressional District in Appendix B, *infra*, p. 39: We have but to add hind legs and a tail to see a fattened version of Governor Gerry's original salamander. Drawing a line in an east-west direction all the way across the northern half of the state is directly contrary to the scheme of every congressional districting plan used by the state of Mississippi at least since 1894. Population reasons clearly do not demand it; much more equal districts are obtained by dividing all of the counties now in the First and Second Districts in a north-south direction, instead of an east-west direction. (Appendix E, *infra*, p. 42; a north-south division further would be consistent with all of the detailed evidence introduced as to Mississippi's history, topography, geography, economics, and traditions. Other plans, even more closely following historic precedents in Mississippi, were introduced by appellants in the District Court, and the difference in population between the largest and smallest district in appellants' Revised Delta Plan (Appendix D, *infra*, p. 41) is only 13,672 compared to a difference of 28,061 in the legislature's arbitrary and unusual plan. No evidence whatsoever was introduced by the state to justify the manner in which it acted.

The effect of the plan on the Negro vote was, according to the evidence introduced, a major factor in the legislature's decision. That effect is clear. While 1960 census total population figures permit an insignificant Negro majority in one district, voting age figures that take into account the actual situation in Mississippi clearly show a substantial white majority in every single District, despite the 43% Negro population of the state. The testimony of the appellants' witness, as well as the uncontradicted newspaper

stories introduced into evidence, affirmatively show the discriminatory intent of the Legislature in acting as it did. Further proof of direct intent than was introduced here was not available, and in all likelihood will not be available in any similar case that may ever be presented to the Court from a state with a history of discrimination as long as Mississippi's. As a Federal Court held in parallel circumstances in Alabama, justice would have to be both blind and deaf to ignore the inherent inferences to be drawn from such facts. *Sims* v. *Baggett, supra.* Members of the legislative bodies of states such as Mississippi read the opinions of this Court, even though perhaps with some reluctance, and they are aware that any public statement of legislative intent would doom automatically a plan such as they have here adopted.

D. *The Issues Here Involved Have Not Heretofore Been Squarely Presented to This Court, and Lower Court Differences on Subsidiary Questions Are Now Appropriate for Resolution.*

This Court has not heretofore had before it a case in which such facts were clearly presented, and the issues appropriately formulated for decision on this point. In a slightly different context, this Court has specifically reserved for future decision the basic questions presented here:

> "It might well be that, designedly or otherwise, a[n] . . . Apportionment scheme . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster." *Fortson* v. *Dorsey,* 379 U. S. 433 at 439.

A related question was likewise not reached or decided in *Swann* v. *Adams, supra,* and in *Burns* v. *Richardson, supra;* a similar question was discussed, but not decided because of the failure of proof, in *Wright* v. *Rockefeller,* 376 U. S. 52.

Lower federal courts and state courts have given conflicting treatment to evidence of racial discrimination presented in similar cases, and to the question, as yet unresolved by this Court, of the nature of the requisite proof of such allegations. *Sims* v. *Baggett, supra,* at 104-105; *Kilgarlin* v. *Martin,* 252 F. Supp. 404 (1966); *Meeks* v. *Avery,* 251 F. Supp. 245 (1966); *Bush* v. *Martin,* 251 F. Supp. 484 (1966) at 513; *Jones* v. *Falcey,* 48 N. J. 25, 222 A. 2d 101 (1966), 222 A. 2d 134 (1966); *Hainsworth* v. *Martin,* 386 S. W. 2d 202 (Civil Appeals, Texas, 1965), vacated as moot 382 U. S. 109 (1965), rehearing denied 382 U. S. 1002 (1966); and *Grills* v. *Branigin,* 255 F. Supp. 155 (1966), vacated and remanded *sub nom. Duddleston* v. *Grills,* 35 U. S. L. Week 3233 (January 10, 1967). It is appropriate that this Court now review and instruct lower federal and state courts on these points.

CONCLUSION

The obvious racially discriminatory intent, purpose and effect of House Bill 911, as adopted by the Mississippi legislature, is ironic testimony to the effectiveness of the voting equality decisions of this Court and of federal legislation designed to encourage registration among Negroes. Until the 1966 redistricting here challenged, the Mississippi legislature, with good reason, had never considered the possibility of a substantial Negro vote sufficiently likely to

call for alteration of established patterns of congressional districting; now, faced with such a possibility, it has chosen the racial gerrymander as the best means of preserving white supremacy in the future.

It would indeed be an unfortunate result if the long lines of decisions of this Court protecting the right of all citizens to vote and to fair representation in the Congress of the United States could now be evaded (especially as to appellants who belong to that class whose rights have been most impaired in the past) by the simple expedient of racial gerrymandering.

For the reasons stated, it is respectfully submitted that jurisdiction should be noted.

Respectfully submitted,

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January 20, 1967

APPENDIX A

Judgment of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action Number 3830

PEGGY J. CONNOR, *et al.*,

Plaintiffs,

—v.—

PAUL B. JOHNSON, JR., GOVERNOR OF MISSISSIPPI, *et al.*,

Defendants.

FIRST FINAL JUDGMENT

THIS CAUSE having been submitted and considered by the Court on the claim presented by the complaint and amendment thereto as to the constitutionality of the plan of Congressional districts in Mississippi as ultimately defined by House Bill No. 911, Mississippi Laws 1966; and this Court having examined and considered the arguments and contentions of the parties, has made its findings and conclusions of even date herewith as a part hereof; and pursuant thereto doth now order, adjudge and decree:

(1) That House Bill No. 911, Mississippi Laws 1966 is in all things valid and constitutional, and the present plans of districting the State of Mississippi for the election of members to the lower house of Congress is approved and

adjudged in all things to be valid and proper; and that the claim of the plaintiffs attacking the validity thereof is without merit and is dismissed with prejudice at plaintiffs' cost, to be taxed under the rules of this Court. The per curiam opinion of the Court sufficiently states the findings and conclusions of the Court as to comply with the requirement of Civil Rule 52(a). There is no just reason for delay in rendering final judgment at this time on said claim of the plaintiffs as a part of the subject matter of this suit, and this final judgment thereasto shall now be entered as provided by

(2) The claim of the plaintiffs involving reapportionment of the Legislature of Mississippi has been referred by the Court to the Legislature for its proper action thereon during the fall of this year and it is contemplated and expected that a special session of the Legislature will be convened for that purpose within the near future; and the Court will reserve consideration of that question to await receipt of the work of the special session of the Legislature thereon and full jurisdiction of the parties and the subject matter is reserved and retained by the Court for that purpose.

ORDERED, ADJUDGED AND DECREED, this September 28th, A. D., 1966.

/s/ JAMES P. COLEMAN
United States Circuit Judge

/s/ HAROLD COX
United States District Judge

/s/ DAN M. RUSSELL
United States District Judge

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action Number 3830

PEGGY J. CONNOR, *et al.*,

Plaintiffs,

—v.—

PAUL B. JOHNSON, *et al.*,

Defendants.

Before JAMES P. COLEMAN, *Circuit Judge;* WILLIAM HAROLD COX, *District Judge;* and DAN M. RUSSELL, *District Judge.*

PER CURIAM:

I.

As a result of the decennial census of 1960 and pursuant to the Act of Congress of June 18, 1929, 46 Stat. 21-27, as amended by the Act of November 15, 1941, 55 Stat. 761, 2 U.S.C.A., Section 2a, the number of Representatives in Congress to which the State of Mississippi is entitled was reduced from six to five. For Mississippi this was the third reduction in thirty years. Forty years ago, Mississippi had 8 Representatives in Congress, Florida had 4, and California had 13. Mississippi now has five, Florida 12, and California 38.

The first loss followed the census of 1930. In 1932, after long and acrimonious battle, it appeared that the Legislature would never agree on any redistricting plan and that the seven Representatives would have to be elected from the State at Large. Many candidates began their statewide campaigns. At the last minute, the matter was settled by combining the Seventh and Eighth Districts, eliminating Representative James W. Collier, of Vicksburg, from Congress, just as he was about to become Chairman of the Committee on Ways and Means. Even so, the controversy was carried to the Supreme Court in *Wood* v. *Broom,* 287 U. S. 1, 53 S. Ct. 1, 77 L. Ed. 131, but the new districts were not disturbed.

Following the census of 1950, Mississippi lost another Representative. After the same reluctance and inability to agree that had existed in 1932, the Legislature ultimately resolved the matter by combining the First and Fourth Districts. This ended the Congressional career of Representative John E. Rankin.

Upon the third loss, the problem of redistricting kept the Legislature in an uproar for the major portion of its 1962 regular session. Eventually, the Second and Third Districts were combined. This resulted in the elimination of Representative Frank E. Smith from the Congress. It was this 1962 Congressional Reapportionment which was changed in 1966 by House Bill 911, now under attack. It will be borne in mind that House Bill 911 was, in effect, the direct result of the suit now *sub judice.*

II.

On October 19, 1965, the Mississippi Freedom Democratic Party, an organization composed almost entirely of Negroes, joined by other Plaintiffs, instituted this action for reapportionment of the Five Congressional Districts within the State of Mississippi. It was charged, and admitted, that in 1965 the population of the respective Districts was as follows:

First District (old first and fourth), 364,962.
Second District (old second and third), 608,041.
Third District (old seventh and eighth), 460,100.
Fourth District, 295,072.
Fifth District, 449,565.

The complaint particularly charged that *"Each of the Congressional Districts should contain 435,628 persons, to be apportioned on a strict population basis"*.

Before this Court was assembled to hear the matter, the Legislature enacted, and on April 7, 1966, the Acting Governor approved, House Bill No. 911, Laws of Mississippi of 1966, reapportioning the five Congressional Districts. ~~This was not accomplished, however, until after the Legislative histories of 1932, 1952, and 1962 had, in large measure, repeated themselves.~~

As recast by House Bill No. 911, the five districts will hereafter contain the following population as of the 1960 census:

First District, 15 counties, 449,361.
Second District, 20 counties, 427,468.
Third District, 12 counties, 428,447.
Fourth District, 19 counties, 423,300.
Fifth District, 16 counties, 449,565.

82	2,178,141

It will thus be seen that the population ratio between the largest district and the smallest district is 1.062 to 1. The heaviest variation from the population norm of 435,628 (the figure demanded by Plaintiffs) is only 3.20% above in the Fifth District. This District is surrounded on three sides by the Alabama boundary, the Gulf of Mexico, and the Louisiana boundary, leaving very little maneuvering room in which to meet the norm with perfect mathematical exactness. The extremely low variation in the remaining four districts is as follows:

First District, 3.15% above the norm;
Second District, 1.87% below the norm;
Third District, 1.65% below the norm;
Fourth District, 2.83% below the norm.

Although Plaintiffs had originally demanded that the State be redivided into five districts of 435,628 people each, and although the Legislature had almost achieved that objective to absolute perfection, Plaintiffs were not satisfied with House Bill No. 911. On July 12, 1966, they filed an amendment to the complaint, in which they attacked the

statute on various grounds. The one most vigorously pressed is that the intent, purpose and necessary effect of the new plan will further be, in all likelihood, to deny the Mississippi Freedom Democratic Party and its Members and candidates a fair opportunity to vote and to elect [Negro] candidates to the United States House of Representatives from Mississippi. This contention was paraphrased in the further contention that the new Congressional lines in all likelihood, will delete and leave without meaningful representation a significant segment of the population, including the Plaintiffs and the class which they represent, meaning Negro citizens of the State. The defendants denied these new allegations.

The Court has heard the matter on its merits.[1]

The chief witness for the Plaintiffs was the Secretary of the Mississippi Freedom Democratic Party. His testimony was to the effect that the Plaintiffs feel that they are entitled to have at least one Congressional District of sufficient preponderance in Negro population to ensure the election of a Negro Representative from Mississippi.

By leave of the Court, both sides have filed briefs in support of their respective contentions.

---

[1] While the sole question before the Court was whether House Bill 911 of the Laws of Mississippi of 1966, as far as practicable, apportioned the State into Congressional Districts of equal population in compliance with *Wesberry* v. *Sanders*, there were numerous objections raised by both sides as to the admission of certain items of evidence. Since we are here solely concerned with a Constitutional question of highest importance, rather than to have this opinion transformed into an exposition on the rules of evidence, we have decided to overrule all evidentiary objections and to admit all the evidence offered by either side, to receive such weight and consideration as its credibility, materiality, competency, and relevancy may justify, proceeding then to a determination of whether House Bill 911 does, or does not, comply with the Constitution of the United States.

In their brief, Plaintiffs make the following contentions, which we shall number as points for convenience of further reference.

(1) To be representative of the racial composition of the entire state, a Mississippi Congressional Delegation of five members would include two Negroes. The net effect of House Bill 911 is virtually to ensure that there will be no Negro Congressman from Mississippi for the next ten years;

(2) The Delta region of Mississippi contains eighteen counties, each of which has a population of more than fifty per cent Negro. It is a highly developed agricultural region. For these reasons it should have been included in a separate Congressional District;

(3) Only 32% of the eligible Negroes in Mississippi have registered as compared to twice that percentage of the white eligibles;

(4) The Legislature enacted House Bill No. 911 with the deliberate purpose of discriminating against the Negro population of the State;

(5) That the new Congressional Districts are not adequately co-extensive with the several geological and geographical regions of the State; and

(6) That House Bill No. 911 was, in fact, a racial gerrymander of the type and kind condemned in *Gomillion* v. *Lightfoot,* 364 U. S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960).

III

We are of the view that the adjudication of this controversy is controlled by *Wesberry* v. *Sanders*, 376 U. S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481:

376 U. S. at Pages 7, 8.

"We hold that, construed in its historical context, the command of Art. I, Sec. 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."

376 U. S. at Page 14.

"It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others."

376 U. S. at Page 17.

"All elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same."

376 U. S. at Page 18.

"While it may not be possible to draw congressional districts with mathematical precision, that is no excuse

for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us."

It has thrice been held by three judge district courts, applying *Wesberry*, that one factor, and only one, may be taken into account in apportioning and establishing Congressional districts among the people of a state *and that factor is population. Calkins* v. *Hare,* 282 F. Supp. at Page 824, *Meeks* v. *Anderson,* 229 F. Supp. at Page 278, and *Bush* v. *Martin,* 224 F. Supp. at Page 511, affirmed, sub nom. *Martin* v. *Bush,* 376 U. S. 222, 84 S. Ct. 709, —— L. Ed. 2d —— (1964).

Although it was a state legislative reapportionment case, *Reynolds* v. *Sims,* 208 F. Supp. 431, affirmed 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506, gives further guidance. The Supreme Court said:

377 U. S. at Page 559.

"We determine that the constitutional test for the validity of congressional districting schemes was one of substantial equality of population among the various districts established by a state legislature for the election of members of the Federal House of Representatives."

In *Reynolds,* the Supreme Court further said:

"Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insuffi-

cient justification for deviations from the equal population principle. Again, people not land or trees or pastures, vote."

House Bill No. 911, the product of numerous plans in both Houses of the Legislature, hammered out after a deadlock between the two, complies with the Constitution of the United States and constitutes a valid reapportionment of the five Congressional Districts within the State of Mississippi: We so find as a matter of fact and we so hold as a matter of law.

IV

In order that the Record may be complete and that there may be no doubt that the contentions of the Plaintiffs have thoroughly been considered, we make the following additional findings and comment on the points raised in Plaintiff's brief:

As to Point 1, suggesting that the Congressional Districts should have been so arranged as to ensure the election of at least two Negro Members of Congress, we have only to point to the unanswerable logic of what Mr. Justice Douglas said (dissenting opinion) on this subject in *Wright* v. *Rockefeller,* 376 U. S. 52, 84 S. Ct. 603, 11 L. Ed. 2d 512, reh. den. 376 U. S. 959, 84 S. Ct. 964, 11 L. Ed. 2d 977.

Wesberry and *Reynolds,* supra, in language already quoted, dispose of Point 2.

As to Point 3, we refer the parties to what Judge Wisdom said in *Mississippi Freedom Democratic Party* v. *Democratic Party of Mississippi,* 362 F. 2d 60, June 6, 1966.

As to Point 4, we find that Plaintiffs wholly failed their burden of proof. They proved that there were newspaper

reports as to what a few legislators "thought" or said, but the solemn acts of the Congress or of State legislatures may not be impeached or invalidated on nothing more than newspaper reports. Cf. *Wright* v. *Rockefeller,* supra.

The negative answer to Point 5 may be found in *Wood* v. *Broom,* supra, as well as in the Acts of Congress of June 18, 1929 and November 15, 1941, 46 Stat. 21-27, 55 Stat. 761, 2 U. S. C. A., Section 2a.

As to Point 6, *Gomillion* condemned an effort to take all but four or five of 400 Negro voters out of a municipality while not removing a single white voter, the objective to be accomplished by altering a square shaped city to one having 28 sides, *Gomillion* v. *Lightfoot,* 364 U. S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960). There are no such facts in this case. In other words, *Gomillion* is simply not opposite.

Reapportioning Mississippi into Congressional Districts being the difficult, almost impossible, task that it is, one may well recognize that the Legislature would have much preferred to forget the whole subject—in fact, would have done so had it not been for the compulsion of this suit. Under the law, requiring that the vote of one person shall have substantially the same weight as that of any other in the selection of any particular official or in the decision of any particular elective issue, the Plaintiffs had every right to institute this suit. When the suit was filed the Second District had a population of 608,441. Obviously it would have to give up 172,813 people. The Second District had 360,780 Negroes and 247,661 white residents, a Negro majority of 113,119. The record is silent as to why the Members of the Mississippi Freedom Democrat Party wanted to attack this District. It presented a perfect set up

for their aims and aspirations. They must have known that there was no place to send the 172,813 surplus but to the adjoining First and Fourth Districts. The Third and Fifth Districts already had more than their quota of population. So, the Legislature did what these Plaintiffs in effect forced it to do—it distributed the surplus to the two districts which needed it in order to strike the balance of equality. When this was done the old First District, of predominantly white population from the foundation of the State, wound up with a majority of Negro inhabitants, although small compared to that which formerly existed in the Second District.

The point is, however, that the balance in population among the five districts is as nearly perfect as 174 Legislators could ever be expected to agree upon as a distribution among 82 counties and the vote of every citizen, of whatever race, will now weigh equally in the selection of Representatives in Congress.

The Court therefore finds and holds that as to the Reapportionment of the State of Mississippi for the election of Representatives in Congress the complaint should be and is dismissed at the cost of the Plaintiffs.

We have not overlooked the final contention that the Congressional Reapportionment is invalid because made by a Legislature which is invalidly apportioned. The Act was passed by the Regular 1966 Session of the Legislature elected in 1963 pursuant to laws then in effect and unchallenged. We are, therefore, not in position to entertain this particular attack.

There is another wing to this case, involving Reapportionment of the Legislature, in which the Legislature has

been directed to reapportion. That aspect is yet pending awaiting legislative response.

As to Congressional Reapportionment, the Judgment of the Court is now final.

That which has herein appeared shall constitute the findings of fact and conclusions of law in this case, and an order accordingly will be prepared and entered by the Court.

This September , 1966.

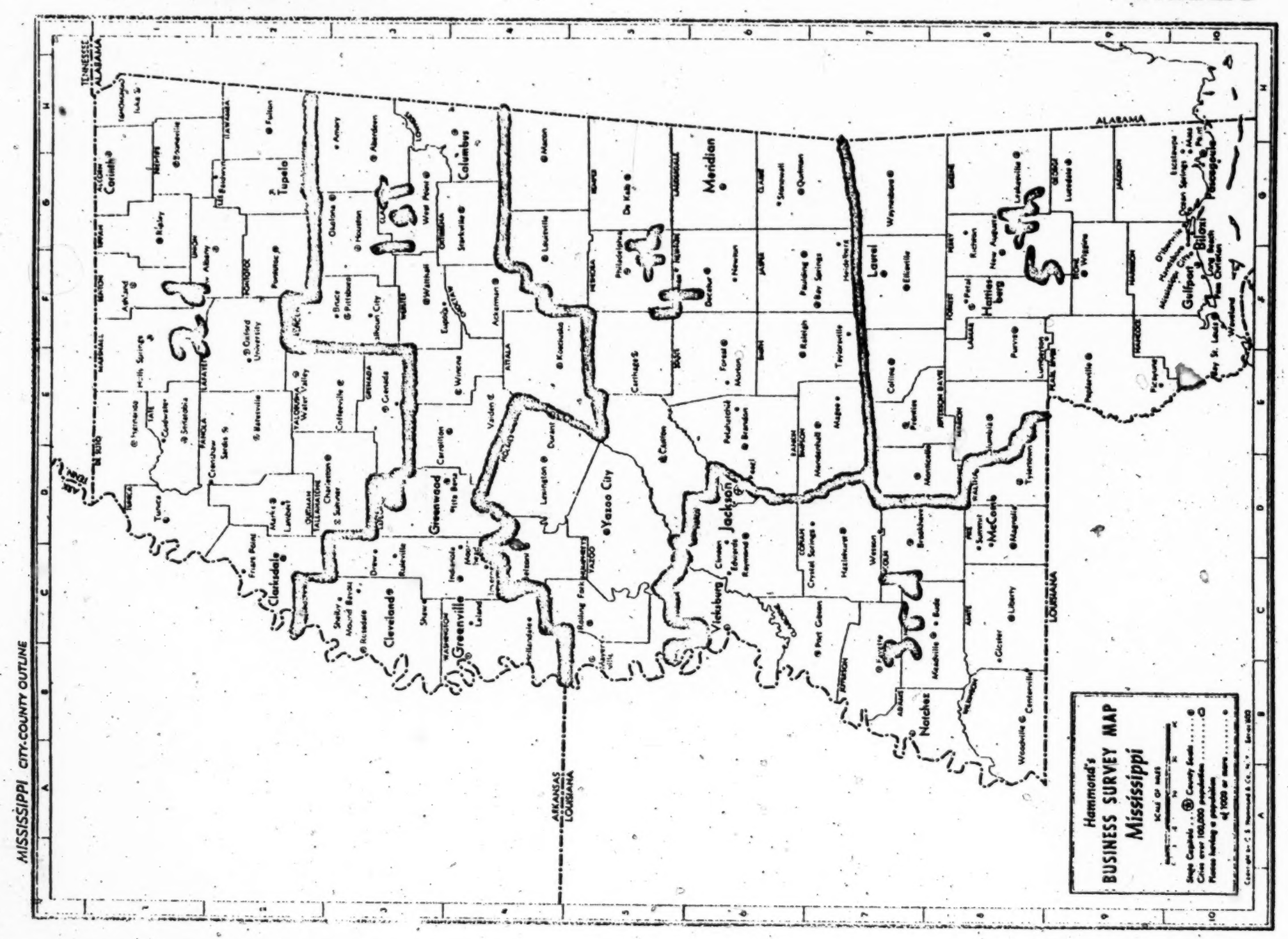
/s/ JAMES P. COLEMAN
United States Circuit Judge

/s/ WILLIAM HAROLD COX
United States District Judge

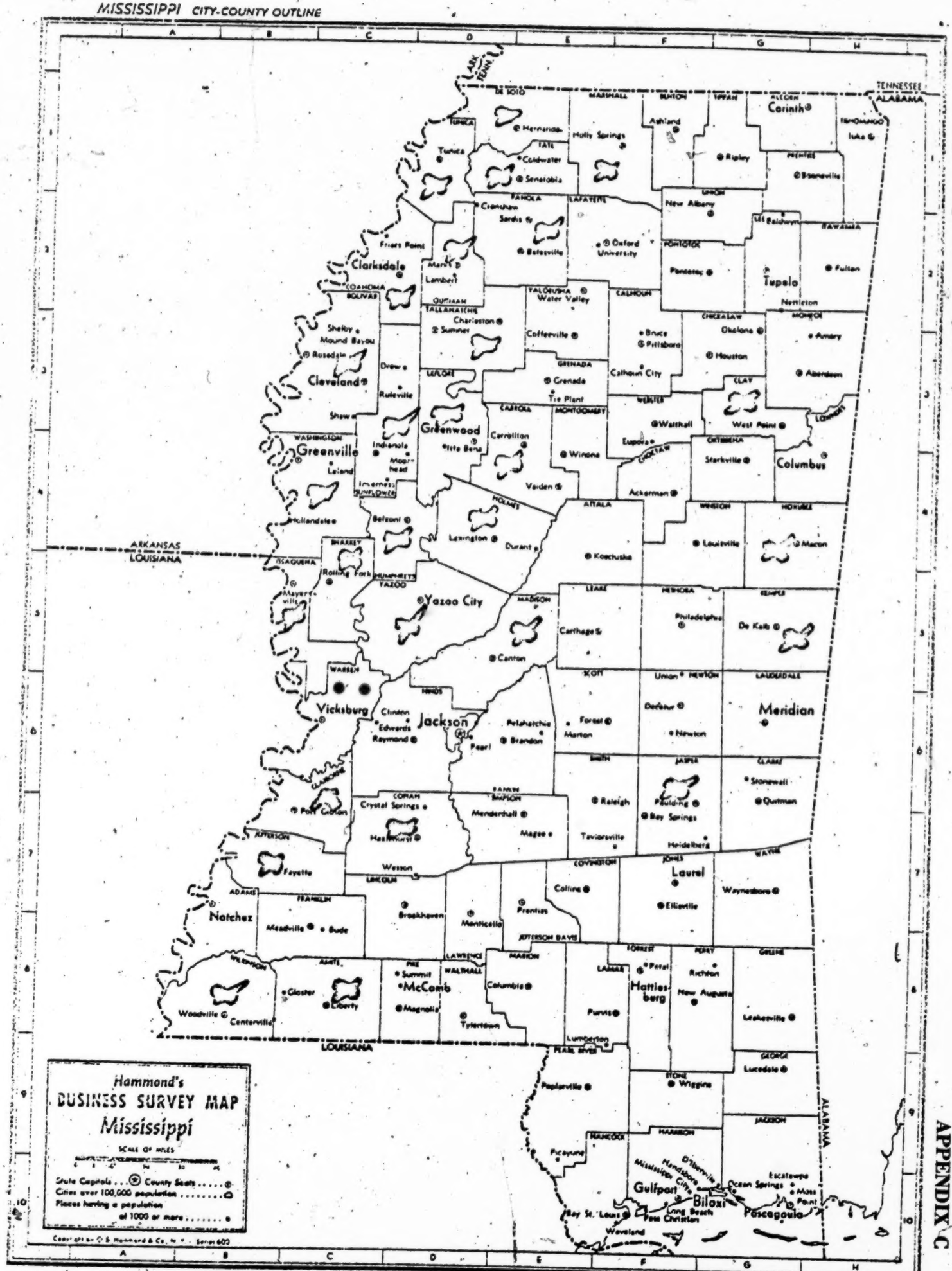
/s/ DAN M. RUSSELL
United States District Judge

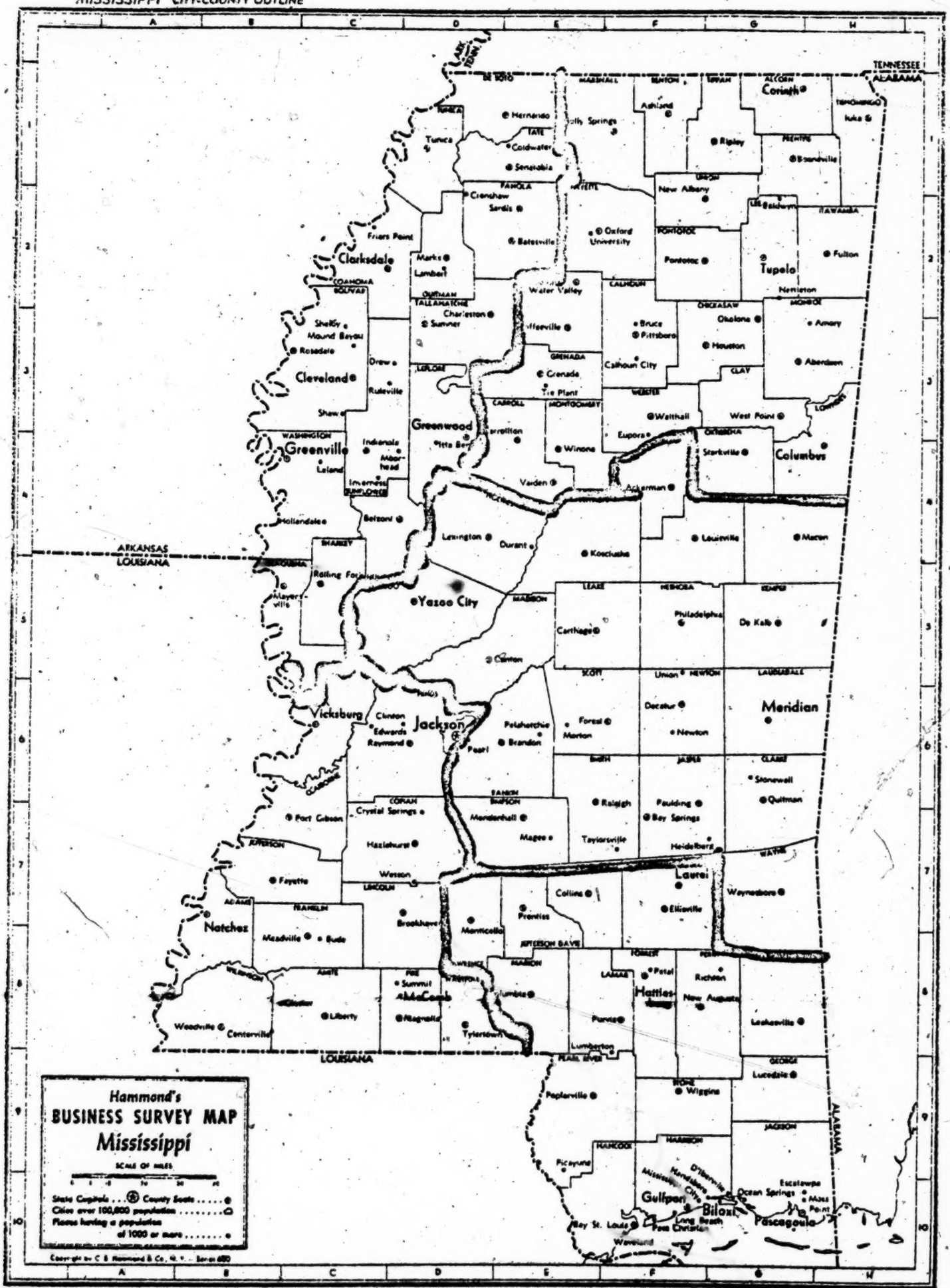
APPENDIX B

(Map Showing District Lines Adopted by Mississippi Legislature)



(Map Showing Counties With Total Negro Population Majorities)




MISSISSIPPI CITY-COUNTY OUTLINE
TENNESSEE
ALABAMA
ARKANSAS
LOUISIANA
LOUISIANA
ALABAMA
Corinth
Tupelo
Clarksdale
Cleveland
Greenville
Greenwood
Columbus
Yazoo City
Vicksburg
Jackson
Meridian
Natchez
Laurel
Hattiesburg
Gulfport
Biloxi
Pascagoula
Hammond's
BUSINESS SURVEY MAP
Mississippi
SCALE OF MILES
State Capitals ... ⊛ County Seats ..... ●
Cities over 100,000 population ..... ⌂
Places having a population of 1000 or more ..... •

APPENDIX E

(Map Showing Northern Vertical Plan)

THE AMOUNT OF THE WHITE OR NON-WHITE MAJORITY IN THE DISTRICT WITH THE HIGHEST PERCENTAGE OF NON-WHITES**

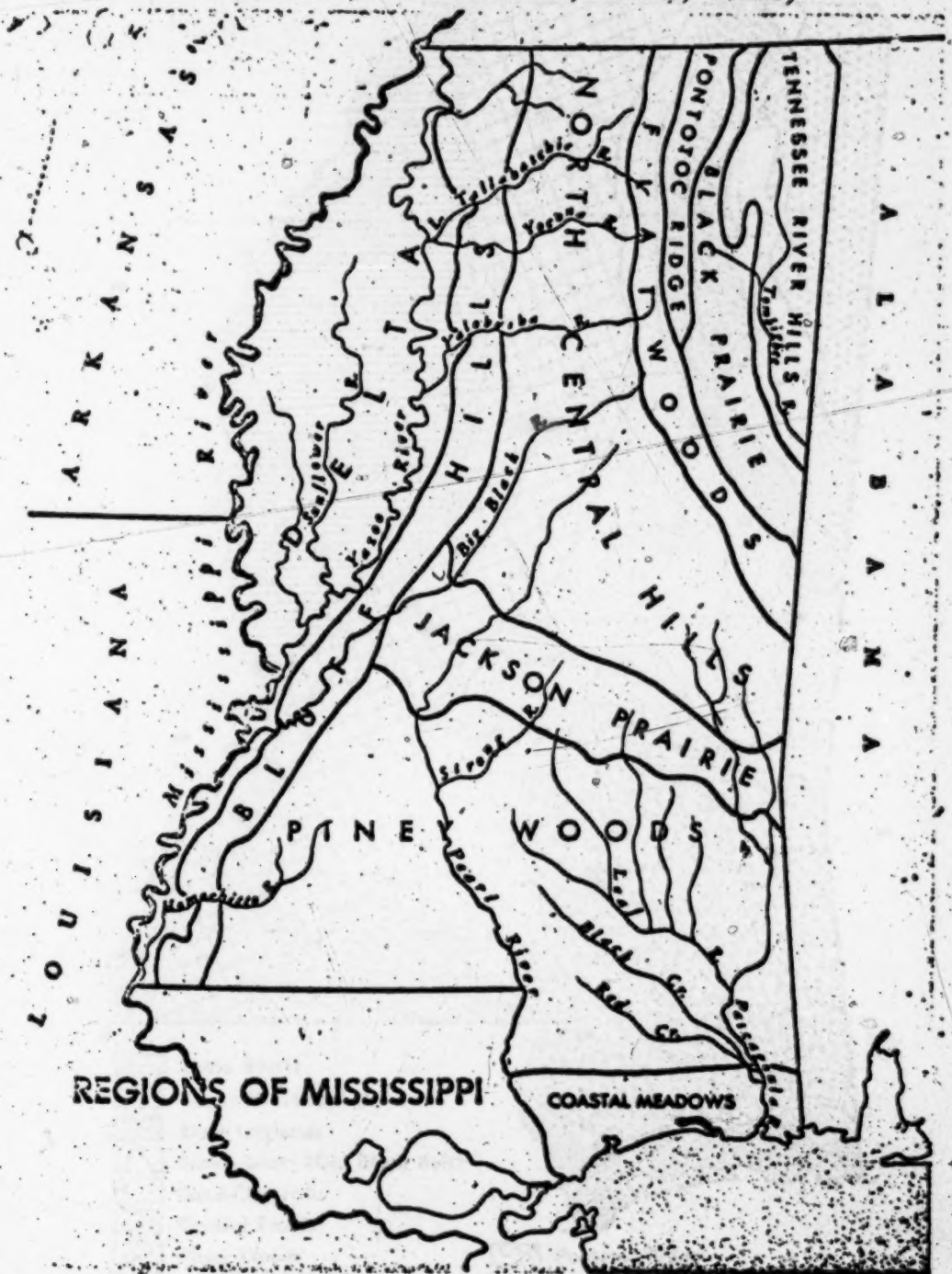
SENATE PLANS:			
Introduced Died in Senate Committee	February 1, 1966	FOSTER PLAN (S.B. 1754)	82,204 nonwhite majority
Passed by Senate	February 15, 1966	ALEXANDER PLAN (S.B. 1739)	40,526 nonwhite majority
Passed by Senate	April 7, 1966	SENATE PLAN OF APRIL 7, 1966 (Amendment No. 2 to H.B. 911)	14,229 nonwhite majority
HOUSE PLANS:			
Passed by House	January 13, 1966	WILLIAMS PLAN (H.B. 63)	15,852 white majority
Passed by	April 6, 1966	HOUSE PLAN OF APRIL 6, 1966 (Amendment No. 1 to H.B. 911)	3,116 white majority
ADOPTED PLAN:			
Passed by Both Houses Signed by Acting Governor	April 7, 1966		1,819 nonwhite majority

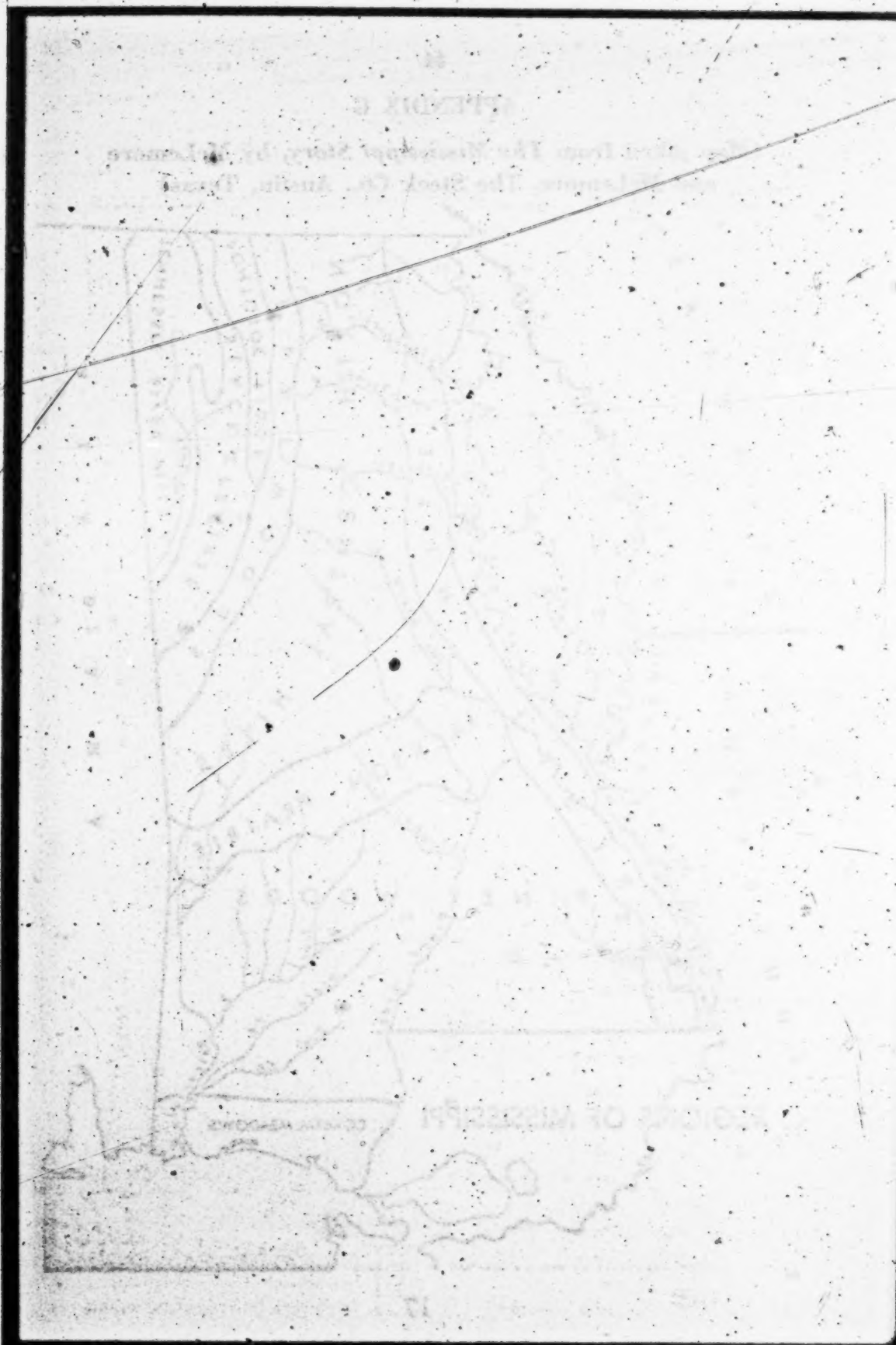
**
1. All figures are based on the statistics published in the Jackson Clarion Ledger, April 8, 1966 Edition.
2. The plans included are all plans for which maps were published in the Jackson newspapers.
3. The plans that have a district with a nonwhite majority have only one district with a nonwhite majority.

Method Used In Compilation:
The statistics published in the Jackson Clarion Ledger, April 8, 1966 edition include total white and total nonwhite population for each district. The majority reported in the above chart is the difference between the two statistics.

APPENDIX G

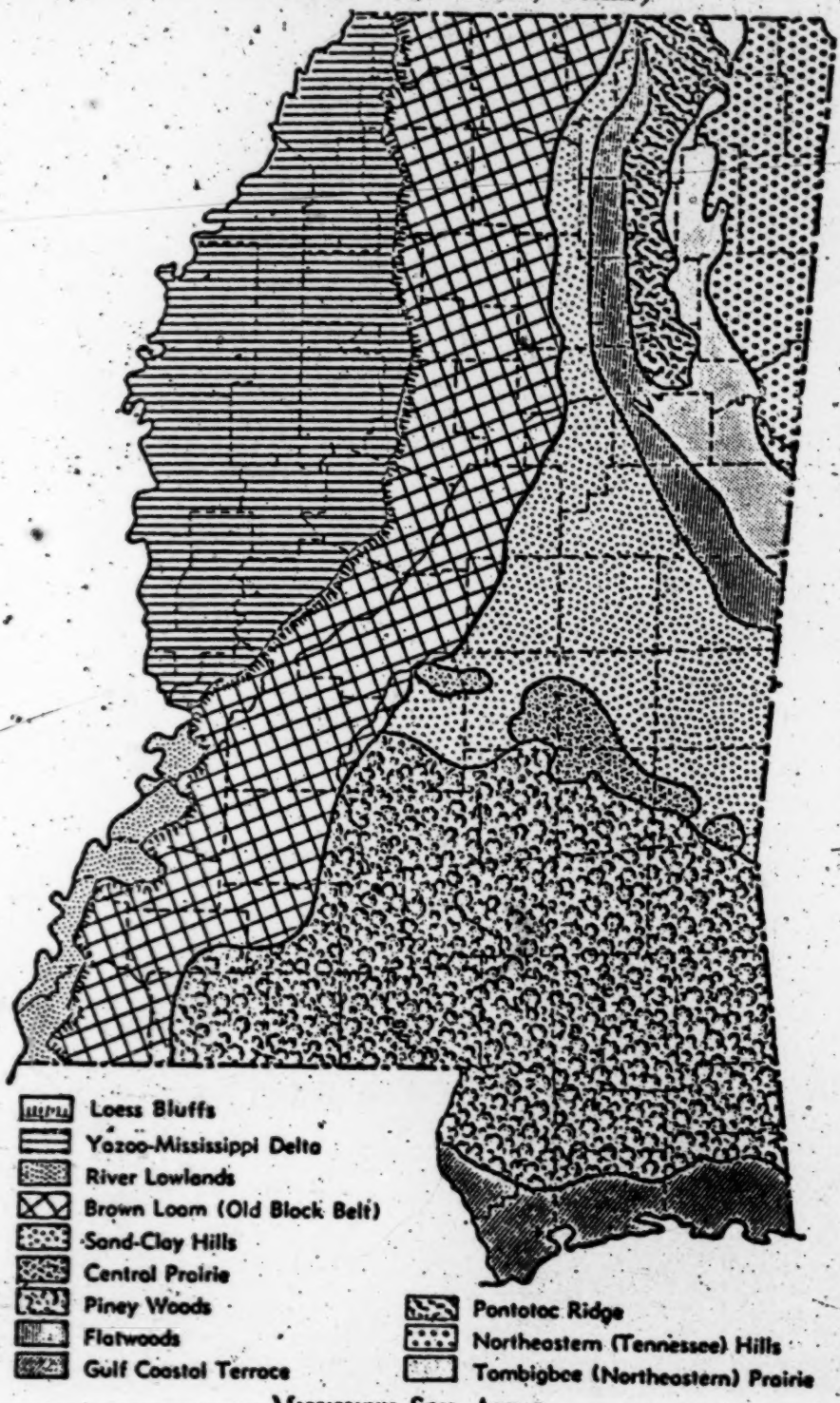
(Map taken from *The Mississippi Story*, by McLemore and McLemore, The Steck Co., Austin, Texas)





APPENDIX H

(Map taken from *Mississippi: A History*, by John K. Bettersworth, The Steck Co., Austin, Texas)



MISSISSIPPI SOIL AREAS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 999

PEGGY J. CONNOR, et al.,
Appellants,

vs.

PAUL B. JOHNSON, JR., Governor of Mississippi, et al.,
Appellees.

MOTION TO DISMISS OR AFFIRM

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INDEX

Motion to Dismiss or Affirm 1

Brief in Support of Motion to Dismiss 2

Jurisdiction 3

Record Filed by Appellants Is Not Complete 3

Brief in Support of Motion to Affirm 5

Statute Involved 5

The Facts 6

Argument—

Findings of Fact Shall Not Be Set Aside Unless Clearly Erroneous, and Due Regard Shall Be Given the Opportunity of the Trial Court to Judge the Credibility of the Witnesses 7

Documents Do Not Show Discrimination 9

No Racial Discrimination Has Been Shown 11

Appellants Seek Preference Not Equality 14

Improper Intent, Motive and Purpose Not to Be Imputed to Legislative Body 16

Conclusion 18

Certificate 20

Appendix A—Affidavit A1

Appendix B—House Bill No. 911 ..... A3

Table of Cases

Anniston Manufacturing Company v. *Davis*, 301 U.S. 337, 81 L. Ed. 1143, 57 S. Ct. 816 12

Beck v. *Washington*, 369 U.S. 541, 8 L. Ed. 2d 98, 82 S. Ct. 955 13

Brown Shoe Co. v. *U. S.*, (1962) 370 U.S. 294, 8 L. Ed. 2d 510, 82 S. Ct. 1502 2

Burns v. *Richardson*, (1966) 384 U.S. 73, 16 L. Ed. 2d 376, 86 S. Ct. 1286 12

Central Greyhound Line, Inc. v. *Mealey*, 334 U.S. 653, 92 L. Ed. 1633, 68 S. Ct. 1260 12

Clark v. *Paul Gray*, 306 U.S. 583, 83 L. Ed. 1001, 59 S. Ct. 744 11

Connor v. *Johnson*, (1966) 256 F. Supp. 962 5

Ellis v. *Dixon*, 349 U.S. 458, 99 L. Ed. 1231, 75 S. Ct. 850 4

Flemming v. *Nester*, 363 U.S. 603, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 ..... 12, 17

Florida C & P Railroad Company v. *Reynolds*, 183 U.S. 471, 46 L. Ed. 283 16

Gomillion v. *Lightfoot*, (1960) 364 U.S. 339, 5 L. Ed. 2d 110, 81 S. Ct. 125 9

McGowan v. *Maryland*, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 7

Mississippi Freedom Democratic Party v. *Democratic Party of Mississippi*, 362 F. 2d 60 14

Morey v. *Doud*, 354 U.S. 457, 1 L. Ed. 2d 1485, 77 S. Ct. 1344 7

New York v. *O'Neill*, 359 U.S. 1, 3 L. Ed. 2d 585, 79 S. Ct. 564 7

Northern Pacific Railroad Company v. *North Dakota*, 236 U.S. 585, 59 L. Ed. 735, 35 S. Ct. 429 11

Portland Cement Company v. *Minnesota*, 358 U.S. 450, 4 L. Ed. 2d 421, 79 S. Ct. 347 12

Priesler v. *Secretary of State of Missouri*, (1966) 257 F. Supp. 953, Aff. (1967) 87 S. Ct. 613 3

Swann v. *Adams*, (1967) 17 L. Ed. 2d 501, 87 S. Ct. 569 .. 6

Travelers Insurance Company v. *Connecticut*, 185 U.S. 364, 46 L. Ed. 949, 22 S. Ct. 673 11

U. S. v. *Appalachian Electric Power Company*, 311 U.S. 377, 85 L. Ed. 243, 61 S. Ct. 291 12

U. S. v. *Hardy*, 351 U.S. 454, 100 L. Ed. 1331, 76 S. Ct. 965 13

U. S. v. *Yellow Cab Co.*, 338 U.S. 338, 94 L. Ed. 150, 70 S. Ct 177 8

Wesberry v. *Sanders*, (1964) 376 U.S. 1, 11 L. Ed. 2d 481, 84 S. Ct. 526 ..... 3, 15, 18

Wright v. *Rockefeller*, (1964) 376 U.S. 52, 11 L. Ed. 2d 512, 84 S. Ct. 603 ..... 3, 8, 9, 16, 18

RULES, STATUTES AND TEXTS

11 Am. Jur. 818 and 819, Constitutional Law, §141 17

16 C.J.S. 175, et seq., Constitutional Law, §154 17

Civil Rule 54(b) 3, 5

Mississippi Code of 1942, Recp.:

§1941 10

§3111 5

§3120 5

§3306 14

§7688 10

§8014 10

Rule 52(a), Fed. Rules Civ. Proc. 7, 8

Rule 75, Fed. Rules Civ. Proc. 4

Supreme Court Rule 13 1

Supreme Court Rule 14(2) 4

Supreme Court Rule 14(3) 4

Supreme Court Rule 16 1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 999

PEGGY J. CONNOR, et al.,
Appellants,

vs.

PAUL B. JOHNSON, JR., Governor of Mississippi, et al.,
Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees move the Court, under Supreme Court Rule 16, to dismiss the appeal for failure of appellants: (1) to invoke proper basis for jurisdiction and (2) to file the complete record herein in docketing this case as required by Supreme Court Rule 13. In the alternative, appellees move the Court to affirm the First Final Judgment of the District Court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument: (1) because the claim for racially segregated districts is ob-

viously without merit and (2) because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject.

It is, therefore, respectfully moved that this appeal be dismissed and, in the alternative, that the judgment of the District Court on the claim of invalidity of the congressional districting statute of Mississippi be affirmed.

Respectfully moved this the 21st day of February, 1967.

Paul B. Johnson, et al.,
Defendants
JOE T. PATTERSON,
Attorney General

By .....

MARTIN R. McLENDON,
Assistant Attorney General
P. O. Box 220
Jackson, Mississippi

BRIEF IN SUPPORT OF MOTION TO DISMISS

Review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before it. *Brown Shoe Co.* v. *U. S.*, (1962) 370 U.S. 294, 8 L. Ed 2d 510, 82 S. Ct. 1502. Appellants' jurisdictional statement consists almost entirely of an oblique assault upon the findings of fact by the District Court notwithstanding the fact that they failed in their duty to file the entire record upon the docketing of the case.

JURISDICTION

The original complaint invoked certain statutes as the basis for the jurisdiction of the District Court. The Constitution of the United States was also invoked ". . . particularly Art. IV, Sec. 4, the Fourteenth Article of Amendment thereto and the Fifteenth Article of Amendment thereto." Art. I, Sec. 2 of the U. S. Constitution providing that representatives to Congress shall be elected by the people, and the basis upon which this Court has held that it was authorized to inquire into the districting statutes providing for the election of members of a coordinate branch of the government, was not invoked in the lower court and has not been sought to be invoked here. See *Wesberry* v. *Sanders*, (1964) 376 U.S. 1, 11 L. Ed. 2d 481, 84 S. Ct. 526; *Wright* v. *Rockefeller*, (1964) 376 U.S. 52, 11 L. Ed. 2d 512, 84 S. Ct. 603; and *Priesler* v. *Secretary of State of Missouri*, (1966) 257 F. Supp. 953, Aff. (1967) 87 S. Ct. 613.

RECORD FILED BY APPELLANTS IS NOT COMPLETE

The case was tried by a statutory Three-Judge District Court without a jury on complaint, amendment to complaint, answer, and answer to amendment on July 15, 1966. Post-trial depositions were authorized and briefs were ordered to be filed. Findings of fact and conclusions of law and a final judgment based thereon, pursuant to Civil Rule 54(b), were filed on September 30, 1966 (App. Br. 25-38). Notice of appeal designating all of the record, exclusive of briefs of counsel, was filed by appellants on October 28, 1966. No cross-designation was filed by appellees because the designation of "all of the record" filed by appellants left nothing further to be designated. On motion the Dis-

trict Court extended the time for perfecting the appeal to and including January 23, 1967.

The record certified by the District Court to this Court did not include a transcript of the testimony and proceedings of the trial for the reasons set forth in the affidavit of the official court reporter and certificate of the Clerk hereto attached as Appendix A, the original of which is on file with the Clerk of this Court.

Supreme Court Rule 13 makes it the mandatory duty of the appellants to docket the case and file the complete record. Material portions of the record consisting of the testimony of witnesses and the trial proceedings have not been filed as required by that rule even though all the record was designated and should have been filed according to the Notice of Appeal. See Rule 75, Fed. Rules Civ. Proc., for requirements concerning record on appeals to Courts of Appeal.

The cause was docketed without a complete record and for the reason that parts of the record are now in possession of this Court and part in possession of the District Court, appellees have not filed a motion to dismiss under Supreme Court Rule 14(2) in the District Court; but instead appellees move this Court to dismiss the appeal under Supreme Court Rule 14(3) for failure of appellants to file the complete record herein as they were required to do so by Supreme Court Rule 13. "This Court has often refused to decide constitutional questions on an inadequate record." *Ellis* v. *Dixon*, 349 U.S. 458, 464, 99 L. Ed. 1231, 75 S. Ct. 850.

Even if appellants had filed the complete record in this case, or are permitted to do by the Court, the judgment of the District Court should be affirmed without further argument.

BRIEF IN SUPPORT OF MOTION TO AFFIRM

The District Court found as a matter of fact that appellants had failed to sustain their attack on the validity of the congressional districting statute adopted by the Mississippi Legislature and concluded as a matter of law that by reason of such failure that portion of the complaint should be finally dismissed as provided by *Civil Rule 54(b)*.[1]

STATUTE INVOLVED

House Bill 911, Miss. Laws of 1966, was introduced as a new bill in the House on April 6, 1966, referred to the committee as a whole, passed by the House, and referred to the Senate. In the Senate, the bill was amended in its entirety, passed by the Senate and returned to the House. The House concurred in the Senate amendments and the bill was approved by the Lieutenant and Acting Governor on April 7, 1966. House and Senate Journals. The deadline for qualifying for the primaries was April 7, 1966, which was sixty days before the primary election, *§3120, Miss. Code of 1942, Recp.*, which was held on the first Tuesday of June, June 7, 1966, *§3111, Miss. Code of 1942, Recp.* A copy of the bill as thus approved is attached hereto as Appendix B.[2]

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1. The emphasized citation was inadvertently omitted from the copy of the judgment appearing on page 26 of Appellants' Brief.

2. Subsequent to the entry of the judgment approving the congressional districting statute the five congressmen allotted to Mississippi have been elected from the districts as thus approved; from Districts 1 and 2 they were elected over incumbent State senators and from District 4 an incumbent State senator was elected over an incumbent State representative (Stipulation); and the congressmen are now serving in the 90th Congress.

Connor v. *Johnson*, (1966) 256 F. Supp. 962, held that the State Constitution and statutes apportioning the State Senate and House of Representatives were invalid. The Legislature was

THE FACTS

Appellants state their version of the facts at length in the jurisdictional statement. Some of those facts are supported by the documentary evidence before the Court, some find their support in the trial proceedings not before the Court and some can find support in the imagination of appellants' counsel only. Because of the incompleteness of the record, ferreting out fact from fancy at this time is not possible. Suffice it to say, the trial court extended to appellants every opportunity to prove their case as alleged to the point of admitting all evidence offered (Op. of D.C., Fn. 1, App. Br., p. 31) and the District Court observed and listened patiently to all witnesses. It is significant that the District Court considered all evidence and arguments advanced on behalf of appellants and concluded that they had failed in their burden of proof on the crucial issue of the case of alleged racial gerrymandering.

One additional fact worthy of note at this time is that the population of each county in Mississippi is composed of substantial numbers of both white and non-white (U. S. Census Bureau designation) population (Stip. Exh. 1), and that no county was divided for congressional redistricting purposes (Appendix B).

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convened in Extraordinary Session to reapportion according to the Court's Opinion, and the validity of that apportionment was being tried on the date this Court rendered its decision in *Swann v. Adams*, (1967) 17 L. Ed. 2d 501, 87 S. Ct. 569, and has been under advisement since that time. A decision of the Court is expected in the near future.

ARGUMENT

Findings of Fact Shall Not Be Set Aside Unless Clearly Erroneous, and Due Regard Shall Be Given the Opportunity of the Trial Court to Judge the Credibility of the Witnesses.

Appellants' argument from beginning to end is based upon the false premise that the congressional districting statute here under attack was adopted with the deliberate purpose of discriminating against the Negro population of the State. This point was designated Point (4) of plaintiffs' contentions by the District Court (App. Br., p. 32) and disposed of by the Court:

> "As to Point 4, we find that plaintiffs wholly failed their burden of proof. They proved that there were newspaper reports as to what a few legislators 'thought' or said, but the solemn acts of the Congress or of State legislatures may not be impeached or invalidated on nothing more than newspaper reports. Cf. Wright v. Rockefeller, supra." (App. Br., pp. 35 and 36)

State statutes are presumed to be valid and the party seeking a declaration of invalidity has the burden of proving that the act is arbitrary. *McGowan* v. *Maryland*, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101; *New York* v. *O'Neill*, 359 U.S. 1, 3 L. Ed. 2d 585, 79 S. Ct. 564; *Morey* v. *Doud*, 354 U.S. 457, 1 L. Ed. 2d 1485, 77 S. Ct. 1344.

The issues of alleged racial gerrymandering and alleged improper motives were squarely before the District Court by allegations and denials and were resolved against appellants by extensive findings of fact. Rule 52(a), Fed. Rules Civ. Proc., provides that this Court is not to retry the case but to determine only whether the findings of fact

pass muster under the clearly erroneous concept set forth therein.

In their oblique attack upon the findings of fact of the District Court appellants imply that those findings are erroneous because the District Court did not accept in toto appellants' version of the case. A study of such of the record as is presently before the Court, the findings of fact and conclusions of law, and the undisputed facts as shown by the record, show that the District Court was eminently correct in its finding that appellants failed wholly to establish their right to the relief sought or any relief whatsoever based upon the proof submitted.

Appellants' attack necessarily asks this Court to accept their version of the facts as alleged, and not proven, and to in effect ignore the District Court's findings and try the case de novo. Extensive citation of authority is not necessary to point out the fallacy of appellants' argument that they did not dignify with a direct presentation. Appellants' arguments, largely speculative, are in total disregard of the evidence found in the record as set forth in the District Court's findings of fact.

This Court has dealt with an approach similar to appellants' in this case before. *U. S.* v. *Yellow Cab Co.*, 338 U.S. 338, 94 L. Ed. 150, 70 S. Ct. 177, held that Rule 52(a), *supra*, applied with equal force to the government as to private litigants and that this Court does not try appeal cases de novo. *Wright* v. *Rockefeller, supra*, affirmed the findings of a divided District Court wherein the attack was upon alleged racially segregated districts as opposed to completely integrated districts as is the case at bar. In so doing, this Court said:

> "We accept the findings of the majority of the District Court that appellants failed to prove that the New

York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines. . . .

"Where there are such conflicting inferences one group of them cannot, because labeled as 'prima facie proof', be treated as conclusive on the fact finder so as to deprive him of his responsibility to choose among disputed inferences. And this is true whether the conflicting inferences are drawn from evidence offered by the plaintiff or by the defendant or by both."

The District Court held that *Gomillion* v. *Lightfoot*, (1960) 364 U.S. 339, 5 L. Ed. 2d 110, 81 S. Ct. 125, relied upon so heavily by appellants herein, was ". . . simply not apposite" (D.C. Op., p. 10),[3] as did this Court in *Wright* v. *Rockefeller, supra.* The difference in Gomillion, this case and Wright is that in the former, Negroes were alleged to have been excluded from municipal boundaries, which this Court found if proven would be discriminatory, whereas in the latter two cases they were included. Another distinguishing feature is that in Gomillion, no trial was had and no facts were developed other than those set forth in the complaint, because the case was reviewed in this Court following the sustaining of a motion to dismiss for failure to state a claim by the District Court. This latter distinguishing feature applies to many of the other cases relied upon by appellants.

Documents Do Not Show Discrimination

By Appendices G and H and Exhibits 2 and 13, appellants seek to show that "the Delta" region of Mississippi actually exists. The existence of that geographic area is not denied. However, the argument that "the Delta" has

3. Appellants' copy of the Opinion (App. Br., p. 36) improperly quotes the District Court Opinion by the use of the word "opposite" instead of "apposite" as used by the District Court.

not heretofore been divided in the political life of Mississippi is denied because it is not true. The newspaper exhibits referred to a division of "the Delta" for congressional districting purposes as though such division was a new idea. This vividly illustrates the fallacy of using newspaper reports as facts.

The geographic area known as "the Delta" has been divided almost equally since 1892, for the purpose of the election of all of the judges of the State Supreme Court, *§1941, Miss. Code of 1942, Recp.* See stipulation exhibit 3. This same division of the State is used for the purpose of electing the State's highest administrative officers who are elected from less than the State-at-large. The State Highway Commissioners are elected from Supreme Court districts under the provisions of *§8014, Miss. Code of 1942, Recp.* The members of the Public Service Commission are elected from Supreme Court districts under *§7688, Miss. Code of 1942, Recp.* Specific sections of the Miss. Code of 1942, Recp., require that at least one member of no less than fourteen appointive administration agencies of the State must be a resident of each of the Supreme Court districts.[4]

The evaluation of congressional districting of the State was treated extensively by the District Court and refutes the obviously repetitious series of maps of the congressional districts of the State. Appellants' maps showing what might have been done in districting is contrary to

4. Aeronautics Commission—§7536-02; Board of Bar Admissions—§8647; Board of Cosmetology—§8915-01; Board of Trustees of State Eleemosynary Institutions—§6921; State Game and Fish Commission—§5841; Commission on Hospital Care—§7146-01; State Hospital Commission—§7130; Board of Trustees of Institutions of Higher Learning—§6720; Junior College Commission—§6475-21; Board of Trustees of Mental Institutions—§6946-02; State Oil and Gas Board—§6132-02; Mississippi Penitentiary Board—§7924; Mississippi Real Estate Commission—§8920-03; and State Board of Public Welfare—§7218.

prior decisions of the Court that have held that Courts do not substitute their judgment for the judgment of the Legislature.

"As repeatedly observed, we do not sit as a revisory board to substitute our judgment for that of the Legislature . . . as to matters within its province." *Northern Pacific Railroad Company* v. *North Dakota*, 236 U.S. 585, 59 L. Ed. 735, 35 S. Ct. 429.

". . . it is not the province of a Court to hear and examine evidence for the purpose of deciding again a question which the Legislature has already decided. Its function is only to determine whether it is possible to see that the legislative decision is without rational basis." *Clark* v. *Paul Gray*, 306 U.S. 583, 83 L. Ed. 1001, 59 S. Ct. 744.

". . . the Courts are not authorized to substitute their views for those of the Legislature. We can only consider the legislation that has been had and determine whether or not its necessary operation results in an unjust discrimination between the parties charged with its burdens." *Travelers Insurance Company* v. *Connecticut*, 185 U.S. 364, 46 L. Ed. 949, 22 S. Ct. 673.

No Racial Discrimination Has Been Shown

Appellants' main argument in this Court is based upon the premise of alleged racial discrimination in the failure of the Legislature to create one or more districts with larger non-white populations. Appellants are seeking to have this Court enforce the particular kind of segregation that appeals to them. Compare *Wright* v. *Rockefeller*, *supra*. In doing so, they argue that the "necessary" and "inevitable" effect of the districting statute as it now exists is to bring about racial discrimination by diluting the vote of a significant segment of the population. This argument is wholly without factual proof for its support, was re-

solved against appellants by the District Court, and can only be based upon speculations of appellants' counsel which this Court held do not supply evidence in *Burns* v. *Richardson*, (1966) 384 U.S. 73, 16 L. Ed. 2d 376, 86 S. Ct. 1286, by stating:

> "Speculations do not supply evidence that multi-member districting was designed to have or had the invidious effect necessary to a judgment of the unconstitutionality of the district."

The argument concerning alleged necessary and inevitable effect, being without foundation in fact and wholly without proof to support it, cannot be considered anything other than a hypothetical and abstract argument. "Constitutional questions are not to be decided hypothetically." *Anniston Manufacturing Company* v. *Davis*, 301 U.S. 337, 81 L. Ed. 1143, 57 S. Ct. 816.

"The Courts deal with concrete legal issues, presented in actual cases, not abstractions." *U. S.* v. *Appalachian Electric Power Company*, 311 U.S. 377, 85 L. Ed. 243, 61 S. Ct. 291.

Courts cannot deal in or adjudicate abstractions. *Portland Cement Company* v. *Minnesota*, 358 U.S. 450, 4 L. Ed. 2d 421, 79 S. Ct. 357; and *Central Greyhound Line, Inc.* v. *Mealey*, 334 U.S. 653, 92 L. Ed. 1633, 68 S. Ct. 1260.

Slight implication and vague conjecture are not sufficient to authorize the Court to declare a legislative act invalid. *Fleming* v. *Nester*, 363 U.S. 603, 4 L. Ed. 2d 1435, 80 S. Ct. 1367.

Although this Court stands ready to correct violations of constitutional rights, the burden of showing the essential unfairness violative of such rights must be sustained by one who claims such injustice and seeks to have the

result set aside, and it must be sustained not as a matter of speculation but as a demonstrable reality. *Beck v. Washington*, 369 U.S. 541, 8 L. Ed. 2d 98, 82 S. Ct. 955; *U. S.* v. *Hardy*, 351 U.S. 454, 100 L. Ed. 1331, 76 S. Ct. 965.

The population of each of the counties in Mississippi is both white and non-white, Stip. Exh. 1. The districting statute divided the State along county lines and no county was divided for the purpose of putting parts of it in different districts. The percentages of white and non-white citizens in congressional districts compared with state-wide percentages is as follows:

	White	Non-White
District 1	48.64%	51.36%
District 2	56.86%	43.14%
District 3	54.54%	45.46%
District 4	51.91%	48.09%
District 5	76.19%	23.81%
State-wide	57.73%	42.27%

In districts 1 through 4 the percentage of non-white population per district exceeds the percentage of non-white population state-wide. In one district, the First, the non-white population is greater than the white population. The Fifth District, which has not changed, is the only district where the non-white population does not exceed the state-wide non-white population. As the District Court found:

> "This District is surrounded on three sides by the Alabama boundary, the Gulf of Mexico, and the Louisiana boundary, leaving very little maneuvering room in which to meet the norm with perfect mathematical exactness."

The necessary and inevitable effect of this Court adjudicating that the present congressional districting statute is unconstitutional would be to bring into opera-

tion the provisions of §3306, *Miss. Code of 1942, Recp.*, which requires that in the absence of a valid redistricting statute the congressman shall be elected from the state-at-large. This would have the necessary and inevitable effect of reducing the percentages of non-whites in four of the five districts as they are presently constituted to the state-wide percentages as shown above.

Appellants Seek Preference Not Equality

The proof and argument in the District Court was that one or more districts should have been created with a substantial non-white majority so that, as the District Court found:

> "The chief witness for the Plaintiffs was the Secretary of the Mississippi Freedom Democratic Party. His testimony was to the effect that the Plaintiffs feel that they are entitled to have at least one Congressional District of sufficient preponderance in Negro population to ensure the election of a Negro Representative from Mississippi."

Appellants by this argument seek a segregated congressional district in favor of the non-white population. That approach is sought to be veiled in this Court under the cry of alleged racial discrimination, innuendo, unproven statements of intent and syllogistic argument while the record of what that and other witnesses said has not been brought before this Court for review.

The right to vote is open to all citizens that would exercise that right. No showing whatsoever was made of the denial of the right to vote to appellants or anyone else.

On June 6, 1966, the Court of Appeals for the Fifth Circuit, in *Mississippi Freedom Democratic Party* v. *Democratic Party of Mississippi*, 362 F. 2d 60, speaking through Judge Wisdom, said:

"The legislature, in extraordinary session, repealed statutory provisions and initiated the repeal of constitutional provisions requiring, among other things, a constitutional interpretation test, a complex application form (which some Registrars insisted be executed perfectly), the good moral character test, and the publication of the names of applicants in the newspaper. See 1965 Amendments to Mississippi Constitution. §244, §241 (a) and revisions of Mississippi Code §§3309.6 et seq. The legislature substituted therefor the requirement that applicants for registration be able to read and write, §3209.7, and that they complete a six-question application and take a prescribed statutory oath. The legislature further required that all voters be able to read and write (§3235) and repealed a statute providing for assistance at the polls to illiterate voters, §3212.7."

"The voters of Mississippi ratified the necessary constitutional changes on August 17, 1965. As a matter of fact even prior to this ratification by the voters, the Attorney General of Mississippi, on July 7, 1965, advised the registrars of the respective Mississippi counties that in his opinion the new form prescribed by the legislature was in effect and could be used immediately. By August 1, 1965, the majority of registrars had begun to do so."

Affidavits from each of the election registrars of the State were admitted into evidence. Furthermore, the right to vote has been insured by an act of Congress. Weighted voting in favor of any group because of their residence has been declared to be constitutionally invalid. *Wesberry* v. *Sanders, supra.*

The District Court rejected appellants' plea for a district so arranged as to ensure the election of two Negro members of Congress by stating ". . . we have only to point to the unanswerable logic of what Mr. Justice Douglas

said (dissenting opinion) on this subject in *Wright* v. *Rockefeller*, . . ." (App. Br., p. 35)

Equality of the right to vote and participate in congressional elections is completely and adequately protected and that is not an issue in this case. Appellants seek inequality in their favor and a segregated district that could not be created without dividing counties and municipalities, along lines tortuously drawn to segregate neighborhoods. The Equal Protection Clause of the Constitution does not require that this be done. In fact, the opposite is true and if this were sought to be done to segregate the races, it would be subject to serious constitutional question.

Improper Intent, Motive and Purpose Not to Be Imputed to Legislative Body

Having failed wholly to sustain their allegations of improper motive, intent and purpose in the adopting of the congressional redistricting statute, appellants come here, without the record of what they did prove, and ask this Court to supply the proof by conjecture which they failed to sustain at the trial. They ask this Court to supply by judicial fiat that which they did not prove and to impute an improper motive to the entire membership of the Legislature of Mississippi.

Mr. Justice Brewer, speaking for the Court in *Florida C & P Railroad Company* v. *Reynolds*, 183 U.S. 471, 46 L. Ed. 283, said:

> "We must assume that the legislature acts according to its judgment for the best interest of the State, *a wrong intent cannot be imputed to it.*" (Emphasis supplied)

In rejecting an argument that Congress was motivated by a punitive purpose, the Court in *Flemming* v. *Nester, supra,* said:

> "We observe initially that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. 'I[t] is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void.' Fletcher v. Peck, (U.S.) 6 Cranch. 87, 128, 3 L. Ed. 162, 175."

See also *11 Am. Jur. 818 and 819, Constitutional Law,* §*141;* and *16 C.J.S. 175, et seq.—Constitutional Law,* §*154.*

The language of the District Court for the Southern District of Alabama that approved a congressional districting statute of that state with population variations in excess of those here under consideration is, appellees submit, appropriate here. Before concluding plaintiffs had failed to show that the Alabama statute was constitutionally invalid, that Court said:

> "We have given full and careful consideration to all of the contentions of the plaintiffs, but it does not seem inappropriate to mention the long established rule that legislative acts should not be declared unconstitutional except for clear and cogent reasons. Early in the judicial history of this country, Mr. Chief Justice Marshall stated the rule to be:

'On more than one occasion, this Court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that, in no doubtful case, would it pronounce a legislative act to be contrary to the Constitution.'

"Dartmouth College v. Woodward, 4 Wheat. 518, 625, 4 L. Ed. 629, 656 (1819). See also Fairbank v. United States, 181 U.S. 283, 21 S. Ct. 648, 45 L. Ed. 862 (1901); Walton v. House of Representatives, 265 U.S. 487, 44 S. Ct. 628, 68 L. Ed. 1115 (1925); United States v. Carolene Products Company, 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938); Snowden v. Hughes, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1943); Willoughby, The Constitutional Law of the U. S. (2nd ed.) V. I. §27, p. 46." *Moore* v. *Moore*, 246 F. Supp. 578.

CONCLUSION

The District Court found as a fact that appellants had failed to prove their case as alleged. This finding is amply supported by the lack of evidence and is emphasized by appellants' failure to bring the record made by them in the District Court here for review by this Court. The District Court was of the unanimous view that this case was controlled by *Wesberry* v. *Sanders*, *supra*, and *Wright* v. *Rockefeller*, *supra*.

Appellees submit that the appeal from the judgment of the District Court sustaining the validity of Mississippi's congressional redistricting statute should be dismissed or, in the alternative, that judgment and the opinion upon which it is based should be affirmed without further briefing or argument.

Respectfully submitted this the 21st day of February, A.D., 1967.

Paul B. Johnson, et al.,
Appellees
JOE T. PATTERSON,
Attorney General

By .....
MARTIN R. McLENDON,
Assistant Attorney General,
Attorney for Appellees
P. O. Box 220
Jackson, Mississippi

CERTIFICATE

I, MARTIN R. McLENDON, a member of the Bar of this Court, Attorney of Record for Appellees herein, do hereby certify that I have served copies of the foregoing Motion and Brief on Appellants by depositing a copy of same in a United States Post Office, first class postage prepaid, addressed to the following listed Attorneys for Appellants:

Peter Marcuse, Esq.
Weisman & Weisman
49 Leavenworth Street
Waterbury, Connecticut

Alvin J. Bronstein, Esq.
c/o Lawyers Constitutional
Defense Committee
603 North Farish Street
Jackson, Mississippi

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New York, New York

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511 Fifth Avenue
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Benjamin E. Smith, Esq.
1006 Baronne Building
New Orleans, Louisiana

Morton I. Stavis, Esq.
744 Broad Street
Newark, New Jersey

This the 21st day of February, 1967.

.....

MARTIN R. McLENDON

APPENDIX A

Affidavit

STATE OF MISSISSIPPI
COUNTY OF HINDS

Personally appeared before me, the undersigned authority in and for the above and foregoing jurisdiction, William A. Davis, who, being by me first duly sworn, stated on his oath as follows, to-wit:

(1) That he is one of the official court reporters for the U. S. District Court for the Southern District of Mississippi duly appointed, qualified and acting as such under 28 U.S.C.A., §753, prior to July 15, 1966; and on that date, July 15, 1966, he was the official court reporter in attendance at the session of the statutory Three-Judge Court empaneled to hear a case styled *Peggy J. Connor, et al.* v. *Paul B. Johnson, et al.*, Civil Action No. 3830, then pending in that Court; and that he as such official court reporter did record verbatim by shorthand all proceedings, including testimony of witnesses, had in open court concerning that case on that date.

(2) Since that time neither the plaintiffs nor anyone for them have ordered, requested or notified affiant in any way whatsoever to transcribe the proceedings of the trial of the case of *Connor, et al.* v. *Johnson, et al.*, Civil Action No. 3830, held on July 15, 1966; the notes were not transcribed prior to the rendition of the Court's opinion and the entry of the First Final Judgment because of the press of other Court business. The proceedings of the trial have never been transcribed by this reporter or any other

court reporter; and as a consequence thereof, no transcript of the proceedings has been filed for the records of the Clerk of the District Court.

WITNESS MY HAND this the 8th day of February, 1967.

/s/ William F. Davis
Official Court Reporter
U. S. District Court, Southern
District of Mississippi

SWORN TO AND SUBSCRIBED BEFORE ME this the 8th day of February, 1967.

My Commission Expires January 13, 1971.

/s/ Sue K. Richmond
Notary Public

CERTIFICATE

I, ROBERT C. THOMAS, Clerk of the U. S. District Court for the Southern District of Mississippi, do hereby certify that no transcript of the trial proceedings in the case styled *Connor, et al.* v. *Johnson, et al.*, Civil Action No. 3830, has been filed in this Court and as a consequence thereof, no transcript of the trial proceedings was included in the record transmitted from this office to the office of the Clerk of the United States Supreme Court, Washington, D. C.

WITNESS MY SIGNATURE this the 8th day of February, 1967.

Robert C. Thomas
Clerk
By /s/ E. Mathison
Deputy Clerk

(Seal)

APPENDIX B

House Bill No. 911

AN ACT to amend section 3305, Mississippi Code of 1942, Recompiled, as amended, to apportion and redistrict the congressional districts of the State of Mississippi.

Be it enacted by the Legislature of the State of Mississippi:

Section 1. Section 3305, Mississippi Code of 1942, Recompiled, as amended, is amended to read as follows:

3305. The State of Mississippi is hereby divided into five (5) Congressional districts as follows:

First District. The First Congressional District shall be composed of the following counties: Bolivar, Washington, Sunflower, Leflore, Carroll, Montgomery, Attala, Choctaw, Webster, Calhoun, Chickasaw, Clay, Oktibbeha, Lowndes and Monroe.

Second District. The Second Congressional District shall be composed of the following counties: DeSoto, Tunica, Tate, Panola, Quitman, Coahoma, Tallahatchie, Grenada, Yalobusha, Lafayette, Marshall, Benton, Tippah, Union, Pontotoc, Lee, Itawamba, Prentiss, Tishomingo and Alcorn.

Third District. The Third Congressional District shall be composed of the following counties: Warren, Hinds, Claiborne, Copiah, Jefferson, Lincoln, Franklin, Adams, Wilkinson, Amite, Pike and Walthall.

Fourth District. The Fourth Congressional District shall be composed of the following counties: Issaquena, Sharkey, Humphreys, Holmes, Yazoo, Madison, Rankin, Simpson, Leake, Scott, Smith, Jasper, Newton, Neshoba, Winston, Noxubee, Kemper, Lauderdale and Clarke.

Fifth District. The Fifth Congressional District shall be composed of the following counties: Lawrence, Jefferson Davis, Covington, Jones, Wayne, Greene, Perry, Harrison, Hancock, Forrest, Lamar, Marion, Pearl River, Stone, George and Jackson.

Section 2. The present number of Congressmen in the United States House of Representatives from this State shall continue to serve and represent their respective existing districts until the expiration of the terms for which they were elected. At the general election to be held on the first Tuesday after the first Monday in November, A.D., 1966, there shall be elected one (1) Congressman from each of the five (5) Congressional districts created by the preceding section.

Section 3. In the event a vacancy occurs in either of the five (5) existing Congressional districts by reason of death, resignation or otherwise from the effective date of this act and the expiration of the terms of the present Congressmen, such vacancy shall be filled as provided by existing laws as if this act had not been passed.

Section 4. This act shall take effect and be in force from and after its passage.

Approved: April 7, 1966.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 999

PEGGY J. CONNOR, *et al.*,

Appellants,

—v.—

PAUL B. JOHNSON, JR., Governor of Mississippi, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

APPELLANTS' BRIEF OPPOSING THE MOTION TO DISMISS

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Of Counsel

INDEX

PAGE

BRIEF OPPOSING THE MOTION TO DISMISS:

Jurisdiction 1

Record Filed by Appellants Is Complete 2

APPENDIX—Affidavit 5

TABLE OF AUTHORITIES

Cases:

Brown v. Board of Education, 347 U. S. 483, 98 L. Ed. 873, 74 S. Ct. 686 2

Gomillion v. Lightfoot, 364 U. S. 339, 5 L. Ed. 2nd 110, 113, 81 S. Ct. 125 2

Lane v. Wilson, 307 U. S. 268, 83 L. Ed. 1281, 1287, 59 S. Ct. 872 2

Wright v. Rockefeller, 376 U. S. 52, 68, 11 L. Ed. 2nd 512, 523, 84 S. Ct. 603 2

United States Constitution:

Article I 2

Fourteenth Amendment 2

Fifteenth Amendment 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 999

PEGGY J. CONNOR, ANNE E. TAYLOR, AUGUSTA WHEADON, RALTHUS HAYES, CATHERINE CROWELL, HENRY J. KIRKSEY, ELIJAH CONWELL, JR., ALMA CARNEGIE for themselves and others similarly situated, and THE MISSISSIPPI FREEDOM DEMOCRATIC PARTY,

Appellants,

—v.—

PAUL B. JOHNSON, Governor of Mississippi, JOE PATTERSON, Attorney-General of Mississippi, HEBER LADNER, the Secretary of State of Mississippi, WALTER SILLERS, the Speaker of the Mississippi House of Representatives, GEORGE YARBROUGH, the President Pro Tempore of the Mississippi Senate,

Appellees.

APPELLANTS' BRIEF OPPOSING THE MOTION TO DISMISS

Jurisdiction

Appellees apparently contend in their Motion to Dismiss that the exclusive source of jurisdiction over any question whatsoever involving congressional reapportionment lies in

Article I, Section 2 of the United States Constitution. Whether or not this be so in matters dealing only with strict numerical malapportionment, it is clearly not so where discrimination based on race is alleged. In such situations, the Fourteenth and Fifteenth Amendments to the Constitution are the appropriate basis for jurisdiction. See *Gomillion* v. *Lightfoot*, 364 U. S. 339, 342, 5 L. Ed. 2nd 110, 113, 81 S. Ct. 125; *Lane* v. *Wilson*, 307 U. S. 268, 275, 83 L. Ed. 1281, 1287, 59 S. Ct. 872; *Wright* v. *Rockefeller* (dissent), 376 U. S. 52, 68, 11 L. Ed. 2nd 512, 523, 84 S. Ct. 603; *Brown* v. *Board of Education*, 347 U. S. 483, 98 L. Ed. 873, 74 S. Ct. 686.

The Record Filed by Appellants Is Complete

The Appellees point out that the record sent by the Court below to this Court did not include a transcript of the testimony at the trial itself, and in their brief they imply that such failure was deliberate. Quite to the contrary, the Appellants' Notice of Appeal designated *all* of the record, exclusive of briefs of counsel, and anticipated that under Supreme Court Rule 12(2) such entire record would be prepared for transmission to this Court; it was only through inadvertence or misunderstanding, as set forth in the affidavit hereto attached as an Appendix, that the transcript was not filed earlier. All exhibits, deposi-

tions, etc., were filed at the time of docketing the case, and such transcript is now on file before this Court.

Respectfully submitted this 10th day of March, 1967.

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BENJAMIN E. SMITH
MORTON I. STAVIS
Of Counsel

APPENDIX

Affidavit

STATE OF MISSISSIPPI,
COUNTY OF HINDS.

ALVIN J. BRONSTEIN, being duly sworn, deposes and says:

1. That he is an attorney, duly admitted to the Bar of the Supreme Court of the United States, and one of the attorneys of record for the appellants herein;

2. That he is making this affidavit in support of appellants' brief in opposition to appellees' motion to dismiss;

3. That the transcript of the testimony and proceedings before the Court below was not filed with the Clerk of the Court below and transmitted to this Court with the rest of the record due to an inadvertence and misunderstanding in that this affiant believed that one of the other attorneys of record had ordered the transcript;

4. That on or about November 29, 1966, this affiant had a conversation with the Chief Deputy Clerk of the Court below, Mrs. Elizabeth Mathison, who advised this affiant, that we would have to obtain duplicate copies of all the exhibits and other papers in the file of the court below, since the court below had a rule about not releasing its original papers. On December 3, 1966, this affiant received a letter dated November 30, 1966 from Mrs. Mathison, the Chief Deputy Clerk of the court below, in which she enclosed a list of the exhibits and which letter stated:

"As soon as you are able to furnish us with duplications of these exhibits we will then forward the *record* to the Supreme Court." (Emphasis supplied.)

5. That on December 6, 1966 this affiant received a copy of a letter dated December 5, 1966 from Mrs. Mathison to John F. Davis, Clerk of this Court, which letter stated:

"Enclosed are the original *papers* and *certified copies of the above case* on appeal. The exhibits in this case will follow • • • • " (Emphasis supplied.)

6. These letters and the use of the term *record* led this affiant to believe that the transcript had been ordered from the court reporter and forwarded to this Court, and the first notice that this affiant had that this was not the fact was when he received Appellees' Motion to Dismiss or Affirm.

/s/ ALVIN J. BRONSTEIN

Subscribed and sworn to before me
this 7th day of March, 1967.

/s/ SARAH HARVEY STEVENS
Notary Public
My Commission expires:
May 9, 1970

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

CONNOR ET AL. *v.* JOHNSON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 999. Decided March 27, 1967.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and the case set down for argument.